#1534737706

ID: 88081560

HD
216
.R67

Historic, archived document
Do not assume content reflects current
scientific knowledge, polices, or
practices.

Director's Decisions for California

R&PP
(Recreation and Public Purposes Act)
&
Rights-of-Way

BLM Library
Denver Federal Center
Bldg. 85, OC-521
P.O. Box 25047
Denver, CO 80225

Historic, archived document.

Do not assume content reflects current scientific knowledge, polices, or practices.

DOCKET FILES

RECREATION ACT * 1 Generally ✓

PUBLIC SALE * 3 Classification

Classification of land as unsuitable for disposal under the Recreation and Public Purposes Act will not be disturbed in the absence of positive and substantial evidence that the classification is erroneous.

The Isabella Recreation Development Association, Sacramento 056063

(September 8, 1960)

RO

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Sacramento 056063
5.04g

September 8, 1960

Certified Mail
Return Receipt Requested

DECISION

The Isabella Recreation Development Association	:	Recreation and Public Purposes Application

Decision Affirmed

The Isabella Recreation Development Association has appealed from a decision of the Manager, dated February 15, 1960, which rejected its above-identified recreation and public purposes application under the act of June 14, 1926 (44 Stat. 741) as amended by the act of June 4, 1954 (68 Stat. 173; 43 U.S.C. 869) for the reason that the land is too rough and steep for the purposes applied for.

A letter transmitted with the application states that the land is to be used for recreation purposes and proposes the construction of a community hall, archery range, park, tennis courts, and other appropriate recreational facilities.

The appellant on appeal does not dispute the facts in the matter as outlined in the decision of the Manager nor does it challenge his findings based thereon. However, it asserts that even though there are no sites suitable for the facilities originally proposed, the land is suitable for recreation pursuits such as hiking and horseback riding and facilities can readily be provided for these.

The report of field examination, contained in the record, shows that the lands are located one half to one mile west of Lake Isabella, and that portions of the lands sought are dissected by a small canyon and the lands are rough on each side of the canyon. The other lands are located on French Gulch and rise abruptly on each side of the gulch. All of the lands are covered by boulders and rock outcrops. The report further shows that there is no access to the lands by established roads or highways and no sites suitable for a community hall, tennis courts or any of the other facilities proposed by the applicant. The report also reveals that the Lake Isabella area is about 50 miles from Bakersfield, California, and about 150 miles from Los Angeles, and that the area constitutes a very important recreational outlet to a large segment of the population of Southern California, that population demands for recreation facilities are continually on the increase, and that the lands are required for public recreational purposes to meet the expanding public demand therefor. Also, it appears that Kern County has an extensive recreational development program underway covering lands near Lake Isabella and near the lands in issue. The Director, Kern County Park and Recreation Department, has advised the Bureau that the County wants to develop more camp areas and other facilities to meet the public demand for recreation and has expressed an interest in the lands involved for use in connection with the County's development program.

The recreational uses now proposed by the appellant are those uses which are usually permitted on vacant public lands without formal grants or permissions. The regulation, 43 CFR 254.5(b) provides in part: "Applicants will not be granted title to or use of land under the act except for an established or definitely proposed project." An application for the exclusive use of lands which are already available to the general public for the uses contemplated would not appear to meet the requirements of the statute. Furthermore, to grant to one organization the exclusive right to use a portion of the public domain which is needed by the public for the same purpose would not be in the public interest. (See the Departmental Public Recreation and Land Use Policy (April 16, 1958).)

The Department has generally held that a classification of land will not be disturbed in the absence of positive and substantial evidence that the classification is erroneous. Cf. Mary Refugio Jackson, A-27236, A-27237 (February 29, 1956). The appellant has failed to offer any evidence that the classification is erroneous and therefore has provided no basis for changing the classification of the land. The appellant's application was properly rejected.

Accordingly, the decision appealed from is affirmed.

The Isabella Recreation Development Association is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

Distribution on page 3

DISTRIBUTION:

Mr. John L. Denny, Attorney at Law (Certified Mail)
Mr. F. R. Steese (Regular Mail)
Lands Staff Officer
Appeals List No. 1
JJS

80532-60

Affirmed, A-28776
4-12-1962

DOCKET FILES

RECREATION ACT * 1 Generally

Where lands were classified as not suitable for disposition under the Recreation Act and classified for disposition by public sale and a hearing was conducted under 43 CFR 221.6 to receive evidence relating to the suitability of the land for disposition for the purposes for which classified and where the evidence at the hearing fully supports the classification and warrants no change therein, the Manager's decisions rejecting applications under the Recreation Act are affirmed.

Hunting & Fishing Improvement Club of Stanislaus County, Sacramento 058067-8

(January 5, 1961)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Sacramento 058067
058068
5.04g

January 5, 1961

Certified Mail
Return Receipt Requested

DECISION

Hunting and Fishing Improvement Club of Stanislaus County : Applications under the Recreation and Public Purposes Act (43 U.S.C. sec. 869)
:
Paul W. Gerber, Helen Hurner, and Frank Draghi :
:

Decisions Affirmed

This is an appeal by the Hunting and Fishing Improvement Club of Stanislaus County from decisions of the Manager, Sacramento Land Office, dated December 8 and 9, 1959, rejecting its applications, Sacramento 058067 and 058068, for lease or purchase under the Recreation and Public Purposes Avt of all or parts of secs. 8 and 28, T. 7 S., R. 6 E., and sec. 12, T. 7 S., R. 5 E., M.D.M., California. The lands involved have been classified as suitable or tentatively suitable for disposition pursuant to the public sale applications of Paul W. Gerber, Helen Hurner and Frank Draghi.

The applications under the Recreation Act contained the statement -

> "We plan to use the land for the following purposes: Hunting, family outing and any outdoor recreation for which the land is suited. The use of this land will be available not only for the members of Hunting & Fishing Improvement Club of Stanislaus County but, also, for the general public."

A resolution of the club concerning the proposed use of the land reads -

> "The land will be available to all Hunting and Fishing Improvement Club members and the general public with no restrictions as to the number of persons present at any given time as long as they do not create a hunting safety hazard. All rules and regulations governing the number of persons allowed on the property at any given time will be governed by a majority vote of members present at any official club meeting or a majority vote of the Board of Directors."

Although this resolution is on the books of the Club, no plan of development appears to have been decided on for the general use of the public nor has the Club shown that it has the capital with which to develop the land for recreational purposes. Therefore, since there is no "established or definitely proposed project" the applications must be rejected for that reason alone. See 43 CFR 254.5(b).

Although other defects are apparent in the applications, the crux of the question presented on appeal is whether the lands are suitable for disposition, by lease or sale, under the Recreation and Public Purposes Act or under other provision of law. We will confine our discussion to this question.

As to the 280 acres in sec. 8, the Manager stated that due to steep topography, lack of water and access and because of the small area involved the land has no value for campsite or other recreational purposes. Because of its inaccessibility and its greater value for livestock purposes and the availability of water for livestock he found the 640 acres in sec. 12 unsuitable for disposition under the Recreation Act. He further stated that although sec. 28 could be made suitable for recreation purposes the cost of improvements for such an isolated area would not be warranted. It was also stated concerning section 28 that this area is unsuitable for recreation purposes not only because of inaccessibility but that the terrain is dangerous for use by the general public for institutional camping, youth groups and hunters in groups. The Manager further stated that the three parcels involved had been classified for disposition under the public sale law.

After receipt of the appeal the matter was referred to a hearing examiner to receive evidence and testimony relating to the proper classification of the lands under authority of 43 CFR 221.6. A hearing was conducted on July 12, 1960. In brief, the examiner proposed findings to the effect that the land is not suitable for disposition under the Recreation Act but should be disposed of under the provisions of the Public Sale Act.

The record shows that the three tracts are isolated parcels included within outstanding grazing leases. The historical use of the lands has been for grazing purposes; the lands are unfit for other agricultural purposes. There is no public access to any of the parcels; access to each is gained only by crossing private lands from public roads 5 to 6 miles distant or over privately constructed fire trails or by helicopter. The topography of each parcel can be termed as rough and mountainous and each has insufficient flat land to permit more than a dozen campers at one place at the same time. The 280 acres in section 8 are without water and under a uniform cover of dense chaparral. Sections 12 and 28 generally have sufficient water for livestock purposes.

The witnesses for the Club indicated that the lands under application are desirable for hunting purposes. It was indicated that no plan had been made to develop the lands for recreational purposes - that the use for hunting did not necessitate any development. It was further presented that the sole purpose of acquisition is for hunting but that the public would be permitted to use the land during other than hunting season. These witnesses showed that access, although difficult, was not impossible and that section 12 had been reached on occasion by helicopter.

Evidence adduced by the public sale applicants shows that access to the three parcels had been accomplished in the past by trespass over their lands. They showed that available water was required for their livestock operations and that indiscriminate use of the lands hampered livestock operations and that occupation of the lands by more than a very few persons would create extreme hazards to hunters.

The evidence shows that hunting upon any of the parcels for even a few hours would cause an exodus of game rendering the parcel worthless for further hunting for not less than another 24 hours. It was also shown that the county and/or state had a large recreational area within a few miles north of these parcels which area was maintained for public purposes.

The evidence considered in its entirety leads us to conclude that the lands under application are primarily sought as small game preserves for hunting purposes. However, the few hours a year that the lands could be used for such purpose does not justify their development for general recreational purposes nor their removal from their historical use for such purposes. To prevent livestock operations from such isolated rough and mountainous tracts and to cut animals off from their usual water supply would seriously hamper not only grazing operations but wildlife in the general area. To do so in the interest of a few who may have sufficient means to gain access to these areas for the few hours a year that the lands could be used for hunting would not be the best use of the land and thus, it would not be in the best interest of the public to favorably consider the recreation applications covering them.

The evidence adduced at the hearing fully supports the classification of the lands involved as not suitable for disposition under the Recreation and Public Purposes Act and supports the classification of the lands as best suited for disposition under the Public Sale Act. The Manager did properly state that the best interests of the Government are served by disposal of these isolated tracts by public sale to the end that they may be used for the purposes for which they are best suited and for which they have been historically used, viz. - for grazing purposes. The record of the hearing furnishes no criteria for the reversal of the decisions below.

Accordingly, the hearing examiner's proposed recommendations are adopted and the Manager's decisions are affirmed.

The appellant herein is allowed the further right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $10.00. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse parties are to be served through their attorneys:

Gilmore & Gilmore 301 Crocker-Anglo Bank Building 1007 Seventh Street Sacramento 14, California	Regional Solicitor U. S. Department of the Interi Box 4291 T. & C. Sacramento, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:
E. Paul Fulfer, Attorney for Appellants (Certified Mail)
Gilmore & Gilmore Attorneys for Public Sale Applicants (Regular Mail) (5)
Regional Solicitor
Hunting & Fishing Improvement Club of Stanislaus County (Regular Mail)
Hon. Thomas H. Kuchel, United States Senate
Hon. John J. McFall, House of Representatives
Hearing Examiner John A. Wood
Lands Staff Officer (5)
Hearings Administrative Officer
State Supervisor, Land & Minerals Officer
Appeals List No. 1
BF

DOCKET FILES

RECREATION AND PUBLIC PURPOSES ACT * 1 Generally
PUBLIC LANDS * 10 Appraisal

The appraisal of land offered for sale under the Recreation and Public Purposes Act will not be disturbed where the record shows that approved procedures were utilized and the appellant offers no evidence to show the appraisal is erroneous.

The fact that a political subdivision is purchasing public land as a site for a public school will be taken into consideration in fixing the purchase price of the land to be sold pursuant to the Recreation and Public Purposes Act.

Douglas City Elementary School District, Sacramento 053913 (February 10, 1961)

In reply refer to:
Sacramento 053913
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 10, 1961

Certified Mail
Return Receipt Requested

DECISION

Douglas City Elementary School District	:	Recreation and Public Purposes Act

Decision of Manager Affirmed as Modified
Case Remanded

The Douglas City Elementary School District has appealed from the Manager's decision, dated August 22, 1960, fixing the price at $1,250.00 at which the appellant shall be permitted to purchase certain public land pursuant to the Recreation and Public Purposes Act, as amended (43 U.S.C., 1958 ed., 869 et seq.)

The appellant asserts this appraisal is excessive and the purchase price, as based on its private appraisal, should be $625.00.

The case record shows that the Manager's finding as to the fair market value of the land is based upon an appraisal made by trained Bureau personnel, utilizing established procedures, including an examination of the prices of comparable lands recently sold in the area. In light of the record, the burden is upon the appellant to show by substantial, affirmative evidence that the appraisal is erroneous. Cf. Daniel Hicken, A-27877 (March 5, 1959). Since the appellant submitted no evidence, and merely relies upon its unbuttressed assertions, there is nothing in the record on appeal to warrant changing the appraisal of the fair market value of the land.

However, taking into consideration the fact that the land is being purchased by a political subdivision for use as the site of a public school, the appellant may be granted an additional deduction not allowed in the decision appealed from. Therefore, the appellant is awarded the right to purchase the land pursuant to its application at a price fixed at $750.00. See 43 CFR, 1954 ed., 254.8(c).

Accordingly, the decision of the Manager is affirmed as modified. Upon this decision becoming final, the case is remanded to the Land Office, through the Bureau's State Supervisor at Sacramento, California, for further appropriate processing in accordance with this decision. Patent will not issue until the full purchase price of $750.00 is paid.

The Douglas City Elementary School District is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken no filing fee will be required, the appellant being a political subdivision. In taking an appeal, there must be strict compliance with the regulations.

A. H. Dunn

Appeals Officer

Enclosure

DISTRIBUTION:

Hon. Clair Engle, United States Senate (Regular Mail)
Hon. Thomas H. Kuchel, United States Senate (Regular Mail)
Hon. Harold T. Johnson, House of Representatives (Regular Mail)
Mr. Jess D. Cannan, Attorney at Law (Certified Mail)
Clerk, Board of Trustees, Douglas City Elementary School District (Regular Mail)
Lands Staff Officer
Appeals List No. 1
JHO'D

A-29064
appeal dismissed 8/17/62 Docket appeal to Sec

DEPT. OF INTERIOR
SACRAMENTO, CAL.
JUN 14 10 00 AM 1961
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Sacramento 065730
5.04g

May 19, 1961

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DOCKET FILES

DECISION

Alpine Estates, Inc. : Recreation and Public
: Purpose Application

Manager's Decision Affirmed

The Alpine Estates, Inc., has appealed from the Manager's decision of February 3, 1961, rejecting its application under the Recreation and Public Purposes Act (43 U.S.C., 1958 ed., 869) to lease certain land in section 35, T. 12 N., R. 19 E., M.D.M., California, for the reason that the land should be retained in Federal ownership for the management of its big game, recreation, range, watershed and mineral resources on a balanced basis.

The appellant has proposed to use part of the land for a refuse dump, and the balance for recreation, fire protection and firearms control, principally for the benefit of its members who have applied for small tracts in the area. The appellant contends that the corporation members were never consulted or given opportunity to show the practicability of these plans for the area.

The question of the proper classification of lands in this section has been presented to this office in connection with appeals filed by many small tract applicants who are associated with the appellant. After careful consideration of their contentions, this Bureau rendered a decision affirming the rejection of the small tract applications on the ground that the lands were properly classified for retention in Federal ownership for the same reasons as stated by the Manager in this case. James G. Blackwell et al., Sacramento 056128 etc. (April 13, 1961).

As appellant's proposed plans relate to the small tract development of the area, it would appear that the rejection of the small tract applications nullifies such plans. In any event, it is concluded, from a review of the record, that the determination that the lands remain in Federal ownership is proper and in the public interest.

The decision appealed from is affirmed.

Alpine Estates, Inc., is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4- 1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

John B. Ciccolo
Acting Appeals Officer

Enclosure

DISTRIBUTION:
Alpine Estates, Inc. (Certified Mail)
Lands Staff Officer
SD (California)
LO (Sacramento)
Attorney's Reading file
Case file
AO reading file
Perm. file

JB

RECEIVED
JUN 14 1961
STATE OFFICE
BUR. OF LAND MGMT.
SACRAMENTO, CALIF.

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.

MAR 19 10 00 AM 1962

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Sacramento 057582

March 7, 1962

Certified Mail
Return Receipt Requested

DECISION

Division of Forestry
Department of Natural Resources
State of California

Recreation and Public Purposes Application

Decision Affirmed

This is an appeal from a decision dated September 26, 1961 rejecting the above-noted application because it has been determined that the applicant does not require the full acreage as requested as its existing facilities occupy approximately one acre only. 1/ The decision also stated that the land was examined and classified as proper for retention in Federal ownership for watershed, wildlife, recreation, and other balanced uses. However, the decision rejected the application without prejudice to the applicant being offered a lease for a period of five years with an option renewal prerogative for the actual acreage required for a fire-fighting facility.

The land involved is a portion of a large compact public land acreage in the Blue Ridge area which has been classified pursuant to the provisions of the Taylor Grazing Act for balanced uses of recreation, watershed, wildlife, grazing and minerals. The California State Department of Fish and Game also contemplates management of abnormally large black-tail deer herd on Blue Ridge via coordinated agreement with the Federal Government.

The appellant contends, in substance, that it has the responsibility for protecting from fire all state and private lands that have timber or watershed values; the lookout is vital to the state as well as the Federal Government in the protection of the natural resources of the area; and that, a recent review of this problem with representatives of the California State Department of Fish and Game indicates that they see no conflict of use. The appellant also contends that a lease would not be satisfactory because it desires a permanent interest in the land so as to facilitate more efficient and effective administration for the public good.

1/ The application is for Lot 1, Sec. 4, T. 9 N., R. 3 W., M.D.M., California embracing 40.13 acres for the Berryessa Lookout and Repeater Site.

In exercising the discretionary authority vested in him by section 7 of the Taylor Grazing Act, as amended, the Secretary may properly consider and weigh all factors which have a bearing on the suitability of the land for use or disposal, including the effect on the public interest. Nelson A. Gerttula, 64 I.D. 225 (1957). The report of field examination shows that the acreage applied for by the appellant was far in excess of any reasonable need for a lookout and repeater site. The appellant has not submitted any positive or convincing evidence that it will need for its purposes a 40-acre tract, or that it is necessary to have title transferred to the land used by it for its facility.

Accordingly, the decision appealed from is affirmed.

This decision is not prejudicial to the right of the appellant to request the withdrawal of the land needed for a lookout facility.

The appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken there is no filing fee. In taking an appeal there must be strict compliance with the regulations.

Richard J McCormick

Legal Assistant
Division of Appeals

Enclosure

DISTRIBUTION:

State of California (Certified Mail)
SD (California)
LO (Sacramento)
Division of Lands and Recreation
Permanent File
Case File
Attorneys' Reading File
Appeals Reading File
JBJ

DEPT. OF INTERIOR
SACRAMENTO, CAL.

APR 9 2 03 PM 1962

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Sacramento 057764

April 4, 1962

DOCKET FILES

DECISION

Eagle Lake Biological Station, Inc. : Recreation and Public Purposes

Decision Vacated; Case Remanded

The above-named party has appealed from a decision dated September 25, 1961, rejecting its above-identified recreation and public purpose application for the reasons that (1) the full purchase price established for the applied-for land has not been paid, (2) there are no compelling reasons why the application should be suspended further, and (3) there is no justification to reexamine and reappraise the land at this time.[1]

The appellant states in its appeal that while the full purchase price of the land has not been remitted as rapidly as desired, it had good reason to believe that the fund-raising campaign was increasing in effectiveness and it would soon have enough money to pay for the land. In addition, the appellant has listed a large number of reasons why its proposed marine biological station is urgently needed, and the reasons for the choice of Eagle Lake as the site for its proposed biological school. It is also indicated in the appeal that a number of schools and colleges, as well as state and Federal agencies would be benefited by the location of such a facility in the area. The record indicates that a number of school officials have shown an interest in the project, and have offered to support it. It has also been suggested that the appellant be allowed to purchase the land at $2.50 per acre under the new pricing schedule announced by the Secretary of the Interior in July, 1961.

Under the Bureau's present land conservation program, it is provided that public land may be disposed of to States, local governments, and non-profit organizations, under the Recreation and Public Purposes Act at the price of $2.50 per acre where it is determined that the acquisition of the land is for (1) Federal aid in Wildlife Restoration projects which are backed by the Fish and Wildlife Service, or (2) "Wildland" fire protection stations (training, administration, lookouts, etc.), and (3) for public education purposes.

It appears that the purpose for which the land is being sought is for public educational purposes, and that the land is therefore subject to purchase under the new pricing schedule.

---

[1] The land in question has been appraised and sold at the appraised price of $6,480 to the appellant, in connection with which, $500 has been paid.

Accordingly, the decision appealed from is vacated and the case remanded to the Manager through the Bureau's office of the State Director for California for appropriate consideration to determine whether or not the appellant's proposed project qualified it to purchase the land at the rate of $2.50 per acre under the new pricing schedule.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

DISTRIBUTION:

Eagle Lake Biological Station (Regular Mail)
Hon. Harold T. (Bizz) Johnson
Division of Lands and Recreation
Case File; SD (California); LO (Sacramento)
Perm. File
Appeals Reading File
Attorneys' Reading File
EBO

RECEIVED
APR 9 1962
STATE OFFICE
BUR. OF LAND MGMT.
SACRAMENTO, CALIF.

WEB
JHC

DEPT. OF INTERIOR
SACRAMENTO, CALIF.
OCT 23 2 01 PM 1962
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

6.05c
Sacramento 061483
October 16, 1962
Certified Mail
Return Receipt Requested

DECISION

County of Lassen : Recreation and Public Purpose
: Lease Application

Decision Affirmed

DOCKET FILES

The County of Lassen has appealed from a decision, dated July 23, 1962, which approved its above-noted application embracing 20 acres of land and offered it a 20-year lease on the land for a sanitary landfill dumpsite, in accordance with plan of use filed with the application, at an annual rental of $25. The appeal is in connection with the annual rental only.

The appellant asserts that the $25 annual rental, based upon a 50% reduction from the Bureau appraisal of $50 per acre, seems excessive when compared to adjacent land values. Adjacent private land to the East is carried on the county assessment records at a value of $10 per acre while the Bureau appraisal of the land under application is five times that amount and appears excessive in view of the barren nature of the land. It requests that the rental rate and the appraised value of the land be reviewed.

In establishing a per annum rental for a 20-year lease it was necessary for the Bureau appraisers to determine the fair market value of the land sought, which it could be expected to bring in a reasonable length of time in an open market. In this connection various factors, including the highest and best use of subject land and the area and neighborhood data, were carefully evaluated and the comparative sales approach data was considered the most applicable in determining the value of the land. Lassen County sets assessed values at 25% of what should be the appraised value of the lands and it is currently re-assessing all lands within the County. Based upon the foregoing data and eleven recent comparable sales in the County ranging from adjusted per acre value of $44 to $135.26, values based upon assessments of very similar lands of from $10 to $23 per acre, and the opinions of local realtors as to the value of subject land, it was determined that the present fair market value of the land sought is $50 per acre, or a total $1,000 for the tract. In accordance with Bureau procedure in arriving at a per annum rental value for a 20-year lease a deduction of 50% was made, making the price of the land $500. Thus the rental was determined as follows:

20 Acres @ $50 per acre	$1,000
50% deduction	500
	$ 500
Annual rental= 1/20 x $500	$ 25

Departmental regulation, 43 CFR 254.8 (d), provides that the annual rental under a lease will be based upon the appraisal of the fair market value of the land sought, taking into consideration the purpose for which the land will be used. The Department has also ruled that a request for the reappraisal of the value of land cannot be considered in the absence of substantial, positive evidence that the current appraisal is erroneous. Cf. Daniel Hicken, A-27877 (March 5, 1959). The appellant has not submitted any positive evidence that the appraised value of the land in question upon which the annual rental is based, is in error.

Accordingly, the decision appealed from is affirmed.

The County of Lassen is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Richard J McCormick
Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:

County of Lassen (Certified Mail)
SD (California)
LO (Sacramento)
Case File
Division of Lands and Recreation
Permanent File
Attorneys' Reading File
Appeals Reading File
RLE

SD - Calif

In reply refer to:
6.05c
Sacramento 069786

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 7, 1963

Certified Mail
Return Receipt Requested

DECISION

Laytonville High School : Recreation and Public Purposes
Willits Unified School District : Lease Application

Decision Affirmed

Laytonville High School has appealed from a decision dated August 6, 1962, rejecting its above-identified application filed under the Recreation and Public Purposes Act, as amended (43 U.S.C. sec. 869). The decision held (1) that the public interest would not be served by classifying the land for the purpose intended by the applicant, its use for an astronomical observatory site not being considered a fundamental curricular activity justifying favorable consideration of the application, and (2) that the land, highly valuable, serves permittees for radar, radio relay, fire lookout and similar purposes, and the needs of the applicant can be served by less valuable land.

The appellant asserts that courses in general science and earth science are offered in the school's curriculum, these courses including substantial units on astronomy in general science for certain grade levels and in earth science at other grade levels. In addition, the school plans to offer some type of descriptive astronomy course to both its regular classes and adult education classes at such time as the facility proposed for the land sought is available. The appellant also contends that there is several times as much mountaintop land in the area not currently in use as the amount of land being used by the present permittees; that there would be no conflict with the current uses by the appellant's use of the small site it requires for its proposed construction; and there is no other land in the area that would serve its purposes as well.

The applicable regulation, 43 CFR 254.5, provides in pertinent part:

> "Applicants will not be granted title to or use of land under the act unless and until (1) the land is first classified as suitable for the purpose sought and not needed for any other public purpose or is not more valuable and suitable for some other use, * * *." (Emphasis supplied).

Even though land may be suitable for disposition under the first application filed therefor, it is not required that it be classified for such disposition if the land is more suitable for other purposes. In exercising the discretionary authority vested in him under Section 7 of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., 315f), to examine and classify public lands, the Secretary of the Interior, or his delegate, may properly consider and weigh all factors bearing on the suitability of land for use or disposal, including the effect on the public interest. Nelson A. Gerttula, 64 I.D. 225 (1957). 1/

A review of the record discloses that the Cahto Peak area (Cahto Mountain in Mendocino County), wherein the land sought is located, constitutes one of the most important sites in the northwest portion of the State for electronic and visual coverage, the purposes for which the lands are presently equipped and currently serving various permittees. The appeal fails to provide a sufficient basis for changing the finding in the decision appealed from that the needs of the appellant can be met in the selection of less valuable land for the facility proposed.

In the circumstances, since it has been determined that the land sought is more valuable and suitable for other public purposes, the highest and best use for the area wherein the applied for land is located being for electronic and visual coverage, it was proper to reject the application.

The decision appealed from is affirmed.

The appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221. See enclosed Form 4-1365. If an appeal is taken, the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

1/ Nelson A. Gerttula v. Stewart L. Udall, Secretary of the Interior, Civil No. 16720, United States Court of Appeals for the District of Columbia, decided October 18, 1962.

DISTRIBUTION

Laytonville High School, Willits Unified School District (Certified Mail)
Division of Lands and Recreation
SD (California)
LO (Sacramento)
Case File
Permanent File
Appeals Reading File
Attorneys' Reading File
MAG

RECEIVED
JAN 21 1963
BUR. OF LAND MGMT.
STATE OFFICE
SACRAMENTO, CALIF.

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.
SEP 10 2 03 PM 1963
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
6.05c
Riverside 02419

August 30, 1963

DECISION

Mariana Ranchos County Water District : Recreation and Public Purposes

Decision Modified
Case Remanded

The Mariana Ranchos County Water District, a non-profit county governmental agency has appealed from that part of a decision, dated May 8, 1963, which set the appraised purchase price for 10 acres of land,1/ to be used for the construction of a water storage tank, at $1,500.

The appellant alleges that the appraised price exceeds the market value.

The record shows that the health department of San Bernardino County requires the construction of a water storage tank, with a minimum capacity of 60,000 gallons, to the standards of the county health department. The tank is to be constructed at an elevation sufficiently high to deliver water by gravity flow to connect to the water system of the water district. This tank will serve the general public in the locality of the project.

On May 31, 1961, the Secretary of the Interior established a program to encourage the construction of public-health facilities. Under this program, lands will be sold at $2.50 per acre, with a minimum price of $50 per transaction, or leased at 25 cents per acre under the Recreation and Public Purposes Act, provided that the grantees meet certain standards of performance. A public water supply system is considered a public-health facility for the purposes of this program.

Accordingly, the decision requiring the purchase price of $1,500 for the land is modified and remanded to the State Director for consideration under the program described above.

H R Hochmuth
Acting Director

1/ The appellants allege in their statement of reasons for appeal that 5 acres would be adequate for their project.

Distribution:

Mariana Ranchos County Water District (Regular Mail)
Division of Lands and Recreation
Division of Appraisals
Appeals List No. 1
MHS

DOCKET FILES

In reply refer to:
6.05c
Riverside 02325

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1963 DEC 18 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

December 12, 1963

Certified Mail
Return Receipt Requested

DECISION

Lake Elsinore Recreation and Park District : Recreation and Public Purposes Application

Decision Affirmed

The Lake Elsinore Recreation and Park District has appealed from a decision of the Riverside Land Office, dated March 15, 1963, rejecting its above-identified application to purchase land for recreation, park and parkway purposes. The application was rejected for the stated reason that the land should not be classified for title transfer under the Recreation and Public Purposes Act because the greater part of the 640-acre section of land applied for is included in an area withdrawn by Executive Order of March 30, 1922, and reserved for Reservoir Site Reserve No. 15, and that the applied for land outside the withdrawn area is beyond the proposed recreation development area. The decision recites that the land was withdrawn on petition of the Temescal Water Company and is utilized by that company for reservoir and associated purposes under authority of certain rights-of-way, and that the said Temescal Water Company objects to the proposed recreational development.

The appellant acknowledges the withdrawn character of part of the applied for land, but takes exception to the objections of the Temescal Water Company, urging that its proposed use would not conflict with the present status and use of the land as a reservoir site. The appellant contends that under regulation 43 CFR 254.3, reservoir sites are not excepted from public lands subject to disposition under the Recreation and Public Purposes Act. However, it is to be noted that section 254.5 of the regulations provides, with certain other limitations not applicable here, that applicants will not be granted title to or use of land under the Act unless the land is first classified as suitable for the purpose sought and, where the land is under the jurisdiction of another agency or instrumentality, that agency or instrumentality consents to the proposed disposition. The record discloses that the Temescal Water Company operates the reservoir as a source of domestic water for the benefit of California State agencies, i.e., the Elsinore Valley Municipal Water District and the City of Elsinore, as well as a source of irrigation water for the Corona area and as an alternate water supply for the City of Corona.

Distribution:

Mariana Ranchos County Water District (Regular Mail)
Division of Lands and Recreation
Division of Appraisals
Appeals List No. 1
MHS

DOCKET FILES

In reply refer to:
6.05c
Riverside 02325

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1963 DEC 18 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

December 12, 1963

Certified Mail
Return Receipt Requested

DECISION

Lake Elsinore Recreation and Park District : Recreation and Public Purposes Application

Decision Affirmed

The Lake Elsinore Recreation and Park District has appealed from a decision of the Riverside Land Office, dated March 15, 1963, rejecting its above-identified application to purchase land for recreation, park and parkway purposes. The application was rejected for the stated reason that the land should not be classified for title transfer under the Recreation and Public Purposes Act because the greater part of the 640-acre section of land applied for is included in an area withdrawn by Executive Order of March 30, 1922, and reserved for Reservoir Site Reserve No. 15, and that the applied for land outside the withdrawn area is beyond the proposed recreation development area. The decision recites that the land was withdrawn on petition of the Temescal Water Company and is utilized by that company for reservoir and associated purposes under authority of certain rights-of-way, and that the said Temescal Water Company objects to the proposed recreational development.

The appellant acknowledges the withdrawn character of part of the applied for land, but takes exception to the objections of the Temescal Water Company, urging that its proposed use would not conflict with the present status and use of the land as a reservoir site. The appellant contends that under regulation 43 CFR 254.3, reservoir sites are not excepted from public lands subject to disposition under the Recreation and Public Purposes Act. However, it is to be noted that section 254.5 of the regulations provides, with certain other limitations not applicable here, that applicants will not be granted title to or use of land under the Act unless the land is first classified as suitable for the purpose sought and, where the land is under the jurisdiction of another agency or instrumentality, that agency or instrumentality consents to the proposed disposition. The record discloses that the Temescal Water Company operates the reservoir as a source of domestic water for the benefit of California State agencies, i.e., the Elsinore Valley Municipal Water District and the City of Elsinore, as well as a source of irrigation water for the Corona area and as an alternate water supply for the City of Corona.

The appellant asserts that the reservoir site (Railroad Canyon Reservoir) is a recreational site as well, there being a resort known as the Railroad Canyon Lake Resort located on the southern portion of the reservoir, operating under lease from the Temescal Water Company. The appellant has attempted to show that under its proposed manner of operation, it would be practically impossible to contaminate the lake if the land sought were opened to the public for recreation.

The record indicates that the major portion of the land applied for is included in a withdrawal which has not been revoked, and without the right to use the land within the withdrawn area adjacent to the reservoir, the appellant would have no use for the remainder of the applied for land. Record information also includes the appellee's specifically stated reasons for its vigorous objections to the appellant's proposal for recreational use of the land in question.

The appellant is correct in its statement that revocation of a withdrawal is not necessary before an application for sale or lease under the Recreation and Public Purposes Act can be allowed. Carl F. Murray and Clinton D. Coker, 67 I.D. 132 (1960). Nevertheless, upon a full consideration of the appellant's showing it is concluded that the reasons offered by the appellee for its strong objections against disposition or use of the lands in question under the Recreation and Public Purposes Act are more compelling than those advanced by the appellant for approval of its application. Therefore, the determination in the decision appealed from that the land should not be classified for title transfer under the Act, was proper. Such refusal to so classify the land is in conformity with this Bureau's present land conservation program, which provides, in part, that leases, sales or other dispositions of public lands shall not be made unless such lease, sale or disposition will serve a sound public purpose.

Accordingly, the decision appealed from is affirmed.

Lake Elsinore Recreation and Park District is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served will be the appellee's attorney:

Mr. Roy H. Mann
Clayson, Stark, Rothrock & Mann
Attorneys at Law
Law Building
Sixth & Main Streets
Corona, California 91720

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mr. Harry M. Dougherty, Attorney for Appellant (Certified Mail)
Mr. Roy H. Mann, Attorney for Appellee
Lake Elsinore Recreation and Park District
Temescal Water Company
Division of Lands & Recreation
Appeals List No. 1
MAG

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1964 AUG 6 AM 10 00

DOCKET FILES

misc

Recreation and Public Purposes Act 2232

> Where additional facts and further study show that reconsideration of a decision rejecting a State's application under the Recreation and Public Purposes Act is warranted, the case will be remanded to enable the State to comply with the requirements of the Department's regulations; or apply for the lands under other appropriate land laws.

State of California, Sacramento 074039 (July 28, 1964)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 AUG 6 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Sacramento 074039

July 28, 1964

DECISION

State of California	:	Recreation and Public Purposes

Case Remanded

The State of California has appealed from a decision of the Sacramento Land Office, dated October 10, 1963, rejecting its application for 200 acres of certain described land on the ground that the land is not proper for disposition to the State under the Recreation and Public Purposes Act.

Thereafter, this matter received additional careful study. The conclusion was reached that the land involved may become subject to acquisition by the State under an exchange or lieu selection program provided it is shown to be in the best interest of the public. It was also concluded that if the State can comply with the regulations under the Recreation and Public Purposes Act and shows good cause for approval of its application, the case may be reconsidered.

Accordingly, this matter is remanded to the Land Office, through the Bureau's State Director, for further appropriate consideration.

Richard J McCormick

Chief, Branch of Land Appeals
Office of Appeals and Hearings

DISTRIBUTION:

State of California
Div. of L&M, S & T (4)
Div. of L&M, P M (2)
Appeals List No. 1
MHS

EPT. OF INTERIOR
ACRAMENTO, CAL.

SEP 10 2 03 PM 1963

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
6.05c
Riverside 02419

August 30, 1963

DECISION

Mariana Ranchos County Water District	:	Recreation and Public Purposes

Decision Modified
Case Remanded

The Mariana Ranchos County Water District, a non-profit county governmental agency has appealed from that part of a decision, dated May 8, 1963, which set the appraised purchase price for 10 acres of land,1/ to be used for the construction of a water storage tank, at $1,500.

The appellant alleges that the appraised price exceeds the market value.

The record shows that the health department of San Bernardino County requires the construction of a water storage tank, with a minimum capacity of 60,000 gallons, to the standards of the county health department. The tank is to be constructed at an elevation sufficiently high to deliver water by gravity flow to connect to the water system of the water district. This tank will serve the general public in the locality of the project.

On May 31, 1961, the Secretary of the Interior established a program to encourage the construction of public-health facilities. Under this program, lands will be sold at $2.50 per acre, with a minimum price of $50 per transaction, or leased at 25 cents per acre under the Recreation and Public Purposes Act, provided that the grantees meet certain standards of performance. A public water supply system is considered a public-health facility for the purposes of this program.

Accordingly, the decision requiring the purchase price of $1,500 for the land is modified and remanded to the State Director for consideration under the program described above.

HR Hochmuth

Acting Director

1/ The appellants allege in their statement of reasons for appeal that 5 acres would be adequate for their project.

Distribution:

Mariana Ranchos County Water District (Regular Mail)
Division of Lands and Recreation
Division of Appraisals
Appeals List No. 1
MHS

DOCKET FILES

In reply refer to:
6.05c
Riverside 02325

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1963 DEC 18 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

December 12, 1963

Certified Mail
Return Receipt Requested

DECISION

Lake Elsinore Recreation and Park District : Recreation and Public Purposes Application

Decision Affirmed

The Lake Elsinore Recreation and Park District has appealed from a decision of the Riverside Land Office, dated March 15, 1963, rejecting its above-identified application to purchase land for recreation, park and parkway purposes. The application was rejected for the stated reason that the land should not be classified for title transfer under the Recreation and Public Purposes Act because the greater part of the 640-acre section of land applied for is included in an area withdrawn by Executive Order of March 30, 1922, and reserved for Reservoir Site Reserve No. 15, and that the applied for land outside the withdrawn area is beyond the proposed recreation development area. The decision recites that the land was withdrawn on petition of the Temescal Water Company and is utilized by that company for reservoir and associated purposes under authority of certain rights-of-way, and that the said Temescal Water Company objects to the proposed recreational development.

The appellant acknowledges the withdrawn character of part of the applied for land, but takes exception to the objections of the Temescal Water Company, urging that its proposed use would not conflict with the present status and use of the land as a reservoir site. The appellant contends that under regulation 43 CFR 254.3, reservoir sites are not excepted from public lands subject to disposition under the Recreation and Public Purposes Act. However, it is to be noted that section 254.5 of the regulations provides, with certain other limitations not applicable here, that applicants will not be granted title to or use of land under the Act unless the land is first classified as suitable for the purpose sought and, where the land is under the jurisdiction of another agency or instrumentality, that agency or instrumentality consents to the proposed disposition. The record discloses that the Temescal Water Company operates the reservoir as a source of domestic water for the benefit of California State agencies, i.e., the Elsinore Valley Municipal Water District and the City of Elsinore, as well as a source of irrigation water for the Corona area and as an alternate water supply for the City of Corona.

The appellant asserts that the reservoir site (Railroad Canyon Reservoir) is a recreational site as well, there being a resort known as the Railroad Canyon Lake Resort located on the southern portion of the reservoir, operating under lease from the Temescal Water Company. The appellant has attempted to show that under its proposed manner of operation, it would be practically impossible to contaminate the lake if the land sought were opened to the public for recreation.

The record indicates that the major portion of the land applied for is included in a withdrawal which has not been revoked, and without the right to use the land within the withdrawn area adjacent to the reservoir, the appellant would have no use for the remainder of the applied for land. Record information also includes the appellee's specifically stated reasons for its vigorous objections to the appellant's proposal for recreational use of the land in question.

The appellant is correct in its statement that revocation of a withdrawal is not necessary before an application for sale or lease under the Recreation and Public Purposes Act can be allowed. Carl F. Murray and Clinton D. Coker, 67 I.D. 132 (1960). Nevertheless, upon a full consideration of the appellant's showing it is concluded that the reasons offered by the appellee for its strong objections against disposition or use of the lands in question under the Recreation and Public Purposes Act are more compelling than those advanced by the appellant for approval of its application. Therefore, the determination in the decision appealed from that the land should not be classified for title transfer under the Act, was proper. Such refusal to so classify the land is in conformity with this Bureau's present land conservation program, which provides, in part, that leases, sales or other dispositions of public lands shall not be made unless such lease, sale or disposition will serve a sound public purpose.

Accordingly, the decision appealed from is affirmed.

Lake Elsinore Recreation and Park District is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served will be the appellee's attorney:

Mr. Roy H. Mann
Clayson, Stark, Rothrock & Mann
Attorneys at Law
Law Building
Sixth & Main Streets
Corona, California 91720

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mr. Harry M. Dougherty, Attorney for Appellant (Certified Mail)
Mr. Roy H. Mann, Attorney for Appellee
Lake Elsinore Recreation and Park District
Temescal Water Company
Division of Lands & Recreation
Appeals List No. 1
MAG

Sacramento 046652 etc.

COUNTY OF SONOMA, JOHN FRANCIS KNOPF ET AL.

Approved August 10, 1965

Public Sales: Recreation and Public Purposes Act: Classification-Protests

Protests against the classification of lands for recreation and public purposes submitted by public sale applicants will be dismissed where it is determined that the highest and best use of the lands is for recreational purposes, and there has been no substantial or positive evidence submitted showing such classification to be in error.

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 AUG 25 AM 10 00

In reply refer to:
722c
Sacramento 046652 _et_ _al_.

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO OFFICE
1965 AUG 25 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

July 21, 1965

DECISION

County of Sonoma : Recreation and Public Purposes
: Petition-Application
John Francis Knopf, _et_ _al_. :
: Public Sale Applications

Protests Dismissed

Ten public sale applications have been filed for lands in Sonoma and Napa Counties, California. A conflicting petition-application was filed for some of these lands by the County of Sonoma.[1]

On July 10, 1964, the Ukiah District Office issued a proposed decision proposing to classify the lands for lease or sale under the Recreation and Public Purposes Act and rejecting the public sale applications. The proposed decision was served on the petitioner-applicant and the public sale applicants.

Protests to the proposed classification were received from public sale applicants, Dr. Ralph V. Harr (SAC. 075902) and Gertrude R. Jones (SAC. 060843), who favor disposition of the particular tracts they applied for at public sale.

Dr. Harr's protest relates to Unit five and Mrs. Jones' protest relates to Units five and six.

Mrs. Jones states, "The primary ground upon which we base this protest is the fact that the State of California is at this moment in the process of creating an extensive park with a large wilderness area approximately one mile only from the subject lands. . . Much of its terrain is identical in ground cover and other natural characteristics to the land in question, and we can see no reason for the government giving away public lands for a wasteful duplication by one governmental body when another has already more than adequately provided for the area."

Dr. Harr states, "Most of this area is very steep and brushy and not suitable for recreation purposes other than for hikes, and then only for the most hardy type. . . My reason for wishing to acquire the land is that it is part of the watershed and goes naturally with the piece that I own."

---

[1] See appendices for list of applicants and description of the lands.

The record shows that consideration was given to the recreation needs of the area, proposed and existing recreation facilities and the physical characteristics of the area proposed for classification. Development plans for the proposed Sugarloaf Ridge State Park indicate a much more intensive development than is proposed for Mt. Hood County Park. Sugarloaf State Park will include facilities for camping, picnicking, and other forms of recreation for large numbers of people. This park will be open to automobile traffic. At Mt. Hood County Park, the development emphasis is to be placed on trails through natural surroundings, with no automobile traffic in the recreation area. The park will be supplemental to the State park project by furnishing visitors with hiking and riding areas. This is consistent with recreation needs of the area, proposed and existing county and State recreation programs and the physical characteristics of the parcels.

The development plans, as proposed and when accepted, will require the protection of the vegetative cover as well as a minimum of soil disturbance; thus the watershed values will be preserved.

The protestants did not present any evidence that the proposed classification was in error. Therefore, their protests are dismissed.

The lands described in Appendix B are classified as proper for lease or sale under the Recreation and Public Purposes Act of June 14, 1926, as amended (43 U.S.C. 869).

This decision constitutes a final administrative determination by the Department under 43 CFR 2411.2(d) as to the recreation and public purposes petition application, and under 43 CFR 1844.1 as to the public sale applications.

Charles H. Stoddard

Director

Approved:

Harry R. Anderson

Assistant Secretary of the Interior

Enclosures 2
Appendices A and B

DISTRIBUTION

Each Applicant listed
  on Appendix A
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
LM

Appendix A

Case File Number	Applicant	Land
Sacramento 046652	John Francis Knopf	Unit 8
Sacramento 053291	John McCormick and Edna May Learned	Units 1 and 7
Sacramento 054408	Sam F. and Alberta J. Moore	Unit 8
Sacramento 054505	John H. and Clara Hattie	Unit 4
Sacramento 054515	Ruth A. Leslie	Unit 3
Sacramento 060843	H. McCoy Jones and Gertrude R. Jones	Units 5 and 6
Sacramento 062450	Joseph and Phillus K. Maddux	Units 5 and 6
Sacramento 062876	Billie Jo Rains	Units 8 and 9*
Sacramento 074574	Robert O. Valentine	Units 5 and 6
Sacramento 075902	Ralph V. Harr	Unit 5
Sacramento 077642	County of Sonoma	Units 1, 2, 3, 4, 5, and 6

This decision also involves Unit 10, which is not presently under application.

* This application also includes lands in T. 7 N., R. 5 W., Mount Diablo Meridian which this decision does not concern.

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 AUG 25 AM 10 00

Appendix B

Mount Diablo Meridian

Unit	Legal Description
	T. 7 N., R. 6 W.,
1	Sec. 5, W½ Lot 3, W½ Lot 4;
2	Sec. 5, Lots 7, 8, 9 and 10;
3	Sec. 7, Lot 4;
4	Sec. 7, Lots 5, 6, 7 and 8; Sec. 8, Lot 8;
5	Sec. 8, Lots 11 and 12; Sec. 17, W½NE¼;
6	Sec. 8, Lot 10; Sec. 17, E½NW¼, SW¼NW¼, NW¼SW¼; Sec. 18, Lots 1, 8, 9 and 16;
7	Sec. 9, NE¼SW¼.
	T. 7 N., R. 7 W.,
8	Sec. 1, E½SE¼;
9	Sec. 11, E½NE¼; Sec. 12, SW¼NW¼, NW¼SW¼.
	T. 8 N., R. 6 W.,
10	Sec. 32, SW¼SW¼.

(containing 1409.62 acres)

~~078598~~- appeal to Sec
affirmed A-30544
1-17-67

DOCKET FILES

Recreation and Public Purposes Act: Valentine Scrip: Applications--Generally 2232, 2221.4

Applications filed under the Recreation and Public Purposes Act and the Valentine Scrip Act for the same tract of land must be rejected where it is determined that the land applied for as an unsurveyed tract of public land does not exist, but is in fact a part of a larger tract of land title to which has been conveyed from the United States.

Surveys of Public Lands: Generally--Omitted Lands 9180

An application for the survey of land purported to be public land omitted from any of the official surveys of lands in the area in which it is supposed to be located, must be rejected where it is determined that such a tract of land does not exist, but is in fact part of a larger tract of surveyed land, title to which has been conveyed from the United States.

MMW Land Company, County of San Luis Obispo, California, Sacramento 076624, 078598 (August 30, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 SEP 7 AM 10 00

In reply refer to:
704
Sacramento 076624
078598

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

August 30, 1965

Certified Mail
Return Receipt Requested

DECISION

MMW Land Company County of San Luis Obispo, California	Valentine Scrip Application; Application for Survey of Omitted Land; Recreation and Public Purposes Act Application

Decision Rejecting Scrip Application Affirmed Application for the Survey of Omitted Land, and Recreation and Public Purposes Application Rejected

The MMW Land Company has appealed from a decision of the Land Office at Riverside, California, dated March 24, 1964, denying its petition for classification and rejecting its Valentine Scrip application, Sacramento 076624, involving a purported unsurveyed tract of land lying north of Lot 5, sec. 1, T. 30 S., R. 10 E., M. D. M., California, as described by metes and bounds in the application, containing approximately 2.388 acres, and supposedly created by a hiatus between the township lines of Ts. 29 and 30 S., Rs. 10 and 11 E.

The County of San Luis Obispo, California, has filed an application, Sacramento 078598, under the Recreation and Public Purposes Act of June 14, 1926, as amended (43 U.S.C., sec. 869-1), to acquire the same land, and in connection therewith has filed an application, same serial number, for the survey of the subject land as omitted lands. 1/

According to both the appellant, the MMW Land Company, and the County of San Luis Obispo, the subject 2.388 acres of land lies on the north side of and adjacent to Lot 5, sec. 1, T. 30 S., R. 10 E., and between this lot and Lot 5, sec. 36, T. 29 S., R. 10 E., on the north. Both applicants allege, in substance, that the omitted land was created by the difference in the location of the boundary lines between the four townships mentioned above, as established by surveys made by various surveyors; James E. Freeman

---

1/ The appellant, the MMW Land Company, has submitted a protest against the applications filed by the County of San Luis Obispo. Mr. Charles E. Ogle, Attorney at Law, representing Ella M. Petersen et al., the present owners of the land in question, has also protested the applications filed by both the MMW Land Company, and the County of San Luis Obispo, and has brought suit in the Superior Court of San Luis Obispo County, Civil Action 27376, to quiet title in the land in question. In a subsequent decision rendered by the Court on June 24, 1965, it was ruled that the Plaintiffs were in fact the owners in fee simple of all of the lands in question.

in 1855, Solomon W. Foreman in 1867 and 1869, A. Leon Cervantes in 1869, and H. C. Ward in 1889. Both applicants seem to rely on the Map of Survey made by Kenneth Beck, County Surveyor, in 1954, at the request of Bruce Bailey, County Assessor, and on the Record of Survey made in 1952 by Pacific Engineers and Surveys, Inc., as their authority for believing that the subject land does exist as an unsurveyed tract. The subject land is designated on these maps as a "questionable area."

Record information shows that under his contract of April 19, 1855, James E. Freeman established the township lines extending east and west and north and south from the corner of Tps. 29 and 30 S., Rs. 10 and 11 E. There is no date on the plat of survey indicating the date of approval of these surveys although they were executed in 1855 and the plat is accepted as an official record. By a subsequent survey made by A. Leon Cervantes of T. 29 S., R. 10 E., a portion of the southwestern boundary of Rancho San Bernardo, shown as Lot 37 on the plat of survey and originally surveyed in 1858 by Brice M. Henry, was resurveyed and the subdivisional lines and meander lines of sections 25 and 36 surveyed. The land within section 36 was subdivided upon the plat of this survey into lots, which include Lot 5, sec. 36, containing 19.50 acres, located north of and adjacent to the township line between T. 29 S., R. 10 E., and T. 30 S., R. 10 E. Cervantes also extended the township line across Estero Bay and the "sand bar" situated between the bay and the Pacific Ocean. The sand bar within sec. 36 was subsequently meandered. The Cervantes surveys were approved April 29, 1870. The 1870 plat of survey was amended by a subsequent plat of survey approved on January 13, 1875, to show specifically the lotting of Moro Rock in sections 26 and 35, as surveyed by R. R. Harris on August 22, 1872.

T. 30 S., R. 10 E., was surveyed by R. R. Harris, in 1870-71, except for lands in section 1 lying on the east side of Moro Bay (Morro Bay or Estero Bay), as shown upon the plat of survey approved March 16, 1871. The Harris work was initiated from the original surveys of the east boundary by Freeman in 1855 and that part of Rancho Canada de los Osos and Pechoy y Islay situated within T. 30 S., R. 10 E., which grant was surveyed by Brice M. Henry in 1858. In 1889, Hubert C. Ward surveyed the two areas of land situated in section 1, lying on the east side of Moro Bay, based upon a resurvey of the township boundary lines extended from the corner of Tps. 29 and 30 S., Rs. 10 and 11 E., as originally established by Freeman in 1855. This survey created Lot 5, section 1, containing 10.27 acres and Lot 6, lying some 17.36 chains south of Lot 5, and containing 0.90 acre. The plat of the Ward surveys was approved October 17, 1889.

T. 29 S., R. 11 E., was subdivided by S. W. Foreman in 1868 as shown upon the official plat approved April 2, 1868. Foreman also surveyed, in 1867, the public lands within T. 30 S., R. 11 E., as shown upon the official plat of that township approved April 24, 1868. The records of those two surveys do not reflect that any corners employed by Foreman were other than those previously established by Freeman in 1855 or by Henry in 1858 and his surveys of fractional sections in these two townships are well related to the earlier township and grant surveys. We find nothing that implies that Foreman set a new corner common to Tps. 29 and 30 S., Rs. 10 and 11 E., which Cervantes may later have employed in his surveys of T. 29 S., R. 10 E., or relocated any prior established township lines in a different position.

Notwithstanding that Cervantes established his meander corner of section 36, T. 29 S., R. 10 E., at a point West, 1.02 chs. from the presumed corner of Tps. 29 and 30 S., Rs. 10 and 11 E., his subsequent connections to Henry's survey of Rancho San Bernardo and to Freeman's corner of secs. 25, 30, 31 and 36, Tps. 29 S., Rs. 10 and 11 E., and the inter-connections between Henry and Freeman, reflect a complete reliance upon and coincidence with the older surveys.

The appellants have relied upon representations of property lines and certain monuments as supporting their contentions that a hiatus exists. None of the evidence submitted in this regard is authenticated original evidence but is rather of local monumentation from several sources purporting to represent original corner points and other subdivisional corners not established in any of the original surveys. Quite pertinent to the substantiation of any corner point of interest to this issue would be its relation to the boundaries of the private land grants and other corners within these four townships. No showing in this regard has been made by the appellants.

There is no direct evidence in the record that later surveys by Foreman, Cervantes or Ward changed any township boundary lines from those originally established by Freeman in his 1855 survey; nor is there any evidence that a hiatus was created between these lines in such a manner or degree that there is a tract of public land north of Lot 5, section 1, T. 30 S., R. 10 E., which was omitted from those surveys.

The decision appealed from was correct in stating that title to Lot 5 section 36, T. 29 S., R. 10 E., vested in the State of California when the plat of survey of this fractional township was approved on April 29, 1870. 2/ The records show that Lot 5 sec. 1, T. 30 S., R. 10 E., containing 10.27 acres, was patented to Mathias Schneider as a homestead entry on July 25, 1892. This patent was issued on the basis of the survey lines shown on the official plat of survey approved on October 17, 1889.. In this connection it is well established that where lands in a grant or patent from the United States are described in terms of the rectangular survey system, the only right, title, or interest acquired thereby is that defined by the corners of the original Government surveys upon which the description is based. J. M. Beard (On Rehearing), 52 L. D. 452 (1928).

2/ Under its statehood act of March 3, 1853 (10 Stat. 244), the State of California was granted sections 16 and 36 in every township in the State for the support of public schools, which grant becomes effective upon the survey of the land.

In this respect it is well established that the Secretary of the Interior is authorized, and is under duty, to consider and determine what lands are public lands, and what public lands remain to be disposed of by the United States. State of Oregon, 60 I.D. 314 (1949). Moreover, and although the Secretary may have surveyed any public lands which have been erroneously omitted from a survey, a plat of survey once accepted is presumed to be correct and will not be disturbed except on clear proof of fraud or gross error, and an application for the survey of omitted lands in the absence of such proof must properly be rejected. Grayce R. Hiler, A-27370 (December 19, 1956); Ralph L. Bassett, Edwin J. Keyser, A-27372 (May 20, 1957). No such proof of fraud or gross error has been presented in the cases under consideration showing there is omitted land in the surveys involved.

Accordingly, the decision rejecting the Valentine Scrip application, Sacramento 076624, is affirmed. The application for the survey of the land applied for as omitted land, and the Recreation and Public Purposes Act application, Sacramento 078598, filed by the County of San Luis Obispo, are hereby rejected. 3/ The protests filed by the MMW Land Company and Charles E. Ogle against the applications filed for the subject land, therefore, are moot and need not be considered.

The MMW Land Company and the County of San Luis Obispo, California are each allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The amount of the filing fee required to be remitted by the MMW Land Company will amount to $5. The County of San Luis Obispo, being a governmental agency, will not be required to remit a filing fee for any appeal filed by it. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

James F Doyle
Chief, Office of Appeals
and Hearings

Enclosures

3/ The Director of the Bureau of Land Management has the authority at any time to take up and dispose of any matter pending in a land office or to review any decision of a subordinate officer, with or without an appeal. State of Utah, 71 I.D. 392 (1964).

DISTRIBUTION

Mr. Paul W. Davis, Attorney for Appellant, MMW Land Company (Certified Mail)
MMW Land Company
County of San Luis Obispo, c/o James W. Powell, District Attorney (Certified Mail)
Mr. Charles E. Ogle, Attorney at Law
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
RBO

appld to Sec Affirmed - A-30596, 11-27-67

DOCKET FILES

misc

Recreation and Public Purposes Act 2232

Applications, under the Recreation and Public Purposes Act, for the lease or purchase of lands for use as industrial waste disposal sites are properly rejected, where the Geological Survey has classified such lands for sodium leasing and has determined that industrial waste disposal on such lands would unreasonably interfere with the extraction of the sodium so classified.

No action cancelling a lease, which was properly issued, is warranted, in the absence of any violation of the lease terms by the lessee or any fatal defect in the issuance of the lease.

Mojave Public Utility District, Riverside 01815 etc. (January 17, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 FEB 14 AM 10 00 ③

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Riverside 01815
01816
02556

January 17, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Mojave Public Utility District : Recreation and Public Purposes

Affirmed in part as Modified
Reversed in part

Mojave Public Utility District has appealed from a decision [1] of the Riverside District and Land Office, dated June 3, 1965, which rejected its applications (Riverside 01815 and 01816), filed pursuant to the Recreation and Public Purposes Act [2], to purchase in part and lease in part certain lands for an industrial waste disposal site. The decision also canceled a 5-year lease issued to the Mojave Public Utility District on January 29, 1963, for part of the lands included in application 01815, for an industrial waste disposal site. The lease was issued as an interim arrangement because of the urgency of the situation, and it was assigned serial number Riverside 02556 to keep it separate from the lands remaining in application 01815.

The decision states that it is based upon a report from the United States Geological Survey, dated May 5, 1965, advising that "the disposal of industrial waste on the lands applied for would greatly jeopardize the future production of salt from the lake brines by contamination of the brines."

The appellant denies that its method of industrial waste disposal threatens to pollute the waters of the State, and it submitted technical reports which tend to support its position.

---

[1] The decision erroneously required the Mojave Public Utility District to pay a $5 filing fee in the event it appealed the decision. The District comes within the exception provided in Departmental regulation 43 CFR 1842.4(b), concerning the payment of appeal filing fees. The $5 filing fee paid by the District will therefore be refunded to it in due course.

[2] Act of June 14, 1926, 44 Stat. 741, as amended, 43 U.S.C. § 869 *et seq.* (1964).

At the outset, it must be pointed out that in the absence of any violation of the lease terms by the Mojave Public Utility District or any fatal defect in the issuance of the lease, no action cancelling the lease is warranted. Cf. Standard Oil Company, 71 I.D. 1, 3 (1964); Harold H. Beck, A-27725 (November 12, 1958); L. D. Dale, A-27166 (November 14, 1955). An analysis of the record does not show that any such violation or defect exists. Therefore, the decision, insofar as it purports to cancel the appellant's lease, is reversed.

The appellant's statement of reasons and the entire case record were submitted to the United States Geological Survey for evaluation. The Geological Survey has determined that the leasing of any lands presently classified for sodium leasing at Koehn Lake would unreasonably interfere with the extraction of the sodium so classified. Consequently, it is no longer necessary to determine whether the waste disposal sites would contaminate the lake brines.

Accordingly, the appellant's applications 01815 and 01816 were, for the reasons stated herein, properly rejected and the decision is, as to these applications, affirmed as modified.

Mojave Public Utility District is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

James F. Doyle
Chief, Office of Appeals and Hearings

Enclosures

DISTRIBUTION:

Mojave Public Utility District (Certified Mail)
U. S. Geological Survey (3)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
MHS

appeal to Sec
affirmed A-30777 6-4-68

DOCKET FILES

Recreation and Public Purposes Act 2232

A classification for lease or sale of public land pursuant to the Recreation and Public Purposes Act, made on the motion of the Government, is effective and the public has due notice when the action is noted in the land office public records; such classification of land for which no application is filed within 18 months after issuance will be vacated and restored to its former status.

Mining Claims: Lands Subject to 3400.1

Land classified pursuant to the Recreation and Public Purposes Act under section 7 of the act of June 28, 1934, as amended, is segregated from appropriation under the mining laws; a mining claim located for such land while the classification order is in effect is void *ab initio*.

Publication and Notice

The Bureau maintains in every land office tract books, or more recently status plats and historical indexes, to show the public records of material facts as to the status of public lands, and notation of these facts on such records constitutes notice to the public of their content since members of the public are at liberty to inform themselves by inspection of such records.

Robert C. Burch a/k/a R. C. Buch, Riverside 04082-B (December 13 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 DEC 27 AM 10 00 ③

Court

In reply refer to:
704
Riverside 04082-B

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

December 13 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Robert C. Burch also known as R. C. Buch : Rusty Can No. 1 Lode Mining Claim located 1/ in the NW¼ sec. 22, T. 10 N., R. 1 E., SBM, California.

Decision Affirmed; Protests Dismissed.

Mr. Robert C. Burch has appealed from the decision of the land office at Riverside dated April 12, 1966, declaring the above-identified mining claim null and void for the reason that the land embraced in the claim was withdrawn from appropriation under the general mining laws on the date of location.

On August 12, 1964, by motion of the Government, the land in issue was classified pursuant to the provisions of the Recreation and Public Purposes Act (43 U.S.C. § 869 et seq. (1964)). The classification of the land was noted in the Bureau's tract book which is available to the public in the land office during regular hours. The appellant and Mr. E. E. Mitchell recorded a notice of location of the mining claim in issue alleging that the claim was located on November 1, 1965, which would be less than 18 months from the date (August 12, 1964) when the land was classified as aforesaid.

43 CFR 2232.1-4 of the departmental regulations provides, in pertinent part:

> (a) . . . lands in the States classified pursuant to the act under section 7 of the act of June 28, 1934 (48 Stat. 1272, 43 U.S.C. 315f), as amended, will be segregated from all appropriations, including locations under the mining laws, ...
>
> (b) Classifications made pursuant to the act on the motion of the Government for which no application is filed within 18 months after issuance will be vacated and the land restored to its former status.

1/ The mining location is a corner-by-corner relocation of the Zenda No. 1 claim (M.S. 6581), which was declared invalid by a land office decision on May 28, 1964, a decision which is now final.

The Rusty Can No. 1 mining claim is on land segregated from such appropriation at the time of the purported location. A mining claim made on land so segregated from mineral entry is void ab initio, since the notation on the land office records withdraws the land from lands available for disposal under the public land laws. Cf. Lyla S. Lofgren, A-28358 (July 20, 1960); Las Vegas Sand and Gravel Co., Inc., A-27761 (June 16, 1960).

On November 24, 1965 (24 days after the claim was located), Mr. Burch filed his protest in the land office against the order classifying certain public lands, including the land embraced within the mining claim in issue, as suitable for sale or lease pursuant to the Recreation and Public Purposes Act, supra. In his protest Mr. Burch asserts, in substance, that the classification order is ineffective and does not segregate the lands from mineral appropriation for the reason that notice of the classification was not published in a newspaper or posted on the public lands involved. On appeal Mr. Burch again protests against the classification order.

In any event, the mining claim would not be validated by any modification of the classification order to permit mining locations. See Betty J. Fuller et al., A-30218 (July 13, 1964).

The motion by the government to have the land in issue included in the order classifying the land was regularly entered upon the public records of the land office. The Bureau maintains in every land office public records of material facts as to the current status of public lands, and notation of these facts on such records constitutes notice to the public of their content. See James C. Forsling, 56 I.D. 281 (1938). To give the public notice the Bureau provides tract books, or more recently status plats and historical indexes. See Eloise L. Beckwith, A-28967 (May 26, 1964); State of Alaska v. Andrew J. Kalerak, Jr., 73 I.D. 1, 9 (1966). The classification of the land was a matter of public record and the appellant was at liberty to inform himself by inspection of the records prior to attempting to locate a claim on the land, and he is chargeable with knowledge of the legal consequences of the facts that inspection of the records would have disclosed to him. See Ted W. Fay et al., A-29781 (January 30, 1964); Eloise L. Beckwith, supra.

In the event that Mr. Burch did not in fact know of the classification order at the time of the purported location, since an inspection at that time of the official land office public records would have informed him of the Government's action, he did have constructive notice that the land had been so classified. Moreover, the cited regulation gave him notice that the order segregated the land from mineral appropriation and that the classification could remain effective for 18 months even though an application seeking the land were not filed pursuant to the Recreation and Public Purposes Act, supra.

For the reasons stated, the decision appealed from determining the mining claim null and void ab initio is affirmed, and both of the appellant's protests are dismissed.

Mr. Burch is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of showing wherein the decision appealed from is in error.

Frances A. Patton

Acting Chief,
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mr. Robert C. Burch (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
JHO'D

In reply refer to:
Los Angeles 0121701
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 8, 1957

Certified Mail
Return Receipt Requested

DECISION

Kaiser Steel Corporation : Rights-of-Way

Manager's Decision Reversed in Part

The Kaiser Steel Corporation requested a Departmental waiver of the annual rental provision under 43 CFR 244.21 and substitution therefor of a lump sum payment for the right-of-way granted pursuant to Private Law 790, 82nd Congress, approved July 8, 1952 (66 Stat. A129). At the same time an appeal was filed from so much of the decision of the Manager, Land Office, Los Angeles, California, dated July 6, 1956, as provides for payment by the Kaiser Steel Corporation of an annual rental for 41 miles of rights-of-way at $10.00 per mile.

The Assistant Secretary of the Interior has granted the waiver of the annual rental provisions of 43 CFR 244.21 and authorized in lieu thereof the acceptance of a lump sum payment for the rights-of-way. The amount of the one sum payment for the permanent rights-of-way is to be determined based upon a reappraisal by the appropriate field office of the Bureau of Land Management.

In the light of the foregoing, it is unnecessary to consider the appeal which is hereby dismissed, and the Manager's decision of July 6, 1956, is reversed to the extent that it provides for annual rental for the rights-of-way.

The case file is being remanded to the Manager through the Bureau's Assistant to the State Supervisor at Los Angeles, California, for reappraisal of the land values and further processing.

Edward Woozley
Director

Attachment
DISTRIBUTION:
Kaiser Steel Corporation (Certified Mail)
Henry J. Kaiser Company (Regular Mail)
Mr. John Sieker, Forest Service, U. S. Dept. of Agriculture (8)
Lands Staff Officer
Appeals List No. 1
WHW
24844

1 copy rec'd.

RECEIVED
LAND OFFICE
SACRAMENTO, CALIF.

OCT 27 1953

A.M. 7 | 8 | 9 | 10 | 11 | 12 | 1 | 2 | 3 | 4 | 5 | 6 P.M.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Los Angeles 081430 LUD:FF

October 19, 1953

DECISION

Southern California Gas Company :
and :
Southern Counties Gas Company :
of California :

Right-of-way Application

Decision of Manager Reversed

The above organizations have appealed to this office from a decision of the Manager of the Land Office at Los Angeles, dated October 30, 1952, rejecting and closing their right-of-way application because of their refusal to file a common carrier stipulation.

The act of August 12, 1953 (P. L. 253, 83 Cong., 1st Ses.) provides in applicable portion that the common carrier provisions of sec. 28 of the Mineral Leasing Act, 30 U.S.C., sec. 185) "shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act (15 U.S.C., sec. 717 et seq.) or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality * * *."

The Federal Power Commission has informally advised this office that the organizations are subject to regulation under the Natural Gas Act. It follows that the common carrier provisions of sec. 28 of the Mineral Leasing Act cannot be applied to the organizations.

Accordingly, the decision of the Manager is reversed and he is directed to grant the application, if all else be regular.

William Pincus
Assistant Director

Distribution: Appellants
All Regional Administrators
All Land and Land & Survey Offices
Mrs. Wallace
Chief, Branch of Land Use and Disposal (2)
Chief, Minerals Division (2)

In reply refer to:
Los Angeles 054902
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 10, 1958

DECISION

California Electric Power Company : Right-of-Way

Manager's Decision Reversed

On August 20, 1941, the California Electric Power Company filed its application, Los Angeles 054902, under the Act of March 4, 1911 (43 U.S.C. sec. 961), for grant of a right-of-way for an electric transmission line from the west boundary of sec. 12, T. 3 S., R. 1 E., to the south boundary of sec. 9, T. 5 S., R. 8 E., S.B.M., across public lands and alloted and tribal lands of the Morongo Mission Indian Reservation in California. The company had earlier purchased from the Metropolitan Water District of Southern California an electric transmission line which traverses certain public and allotted and tribal lands in the sections above indicated.

On March 17, 1942, the General Land Office forwarded the draft of an agreement which required the company to agree to the conditions upon which the grant would be made. These conditions included its promise to comply with certain regulations approved by the Secretary of the Interior in its use of the right-of-way. The company refused to execute the agreement except after elimination of certain of the regulations. The Commissioner of the General Land Office held that the regulations complained of were applicable and the company appealed. The Department affirmed the decision of the Commissioner, 58 I.D. 607, on January 17, 1944, with certain modifications of the agreement. The company then moved for a rehearing which was denied, 58 I.D. 621, with certain modifications of the Department's original decision.

Prior to November 5, 1943, the company had sold a portion of its transmission line to Imperial Irrigation District of El Centro, California. The Department, in its decision denying the company's motion for rehearing considered the company's application as amended and withdrawn to the extent of the right-of-way for that part of the transmission line sold to the irrigation district.

The company has filed its consent to the regulations and has filed proof of construction as required. The Geological Survey and the Bureau of Reclamation have reported favorably on the application.

The Manager of the Land Office, Los Angeles, California, in his decision of September 1, 1955, accepted the proof of construction and approved the right-of-way except as to the portion of the line upon Indian lands. The Manager held the company responsible for the entire right-of-way over public lands, including the portion for which the Imperial Irrigation District had purchased the transmission line and considered that portion in computing the yearly rental due. Thirty days were allowed in which to pay the rental, failing in which the right-of-way was to be cancelled. The company has appealed.

The Manager erred, when in computing the rental due he considered that portion of the right-of-way for which the transmission line had been sold to the Imperial Irrigation District. The company in its letter of November 5, 1943, stated that it had sold a portion of its transmission line to the Imperial Irrigation District of El Centro, California, and requested that its application for right-of-way be amended by deleting from its application the portion of the line which had been sold. The following is quoted from the Department's decision denying the company's motion for rehearing, 58 I.D. at 627:

> "Accordingly, the application is considered as amended and withdrawn by the letter of November 5, 1943, to the extent of the right-of-way for the transmission line from the west line of Sec. 3, T. 3 S., R. 4 E. (station 981/26.1), to the south line of Sec. 9, T. 5 S., R. 8 E. (station 2481/21.4), S.B.B. & M., shown on the detail maps designated as sheet 1 of 2 and sheet 2 of 2. Appellant describes the portion of the line to be withdrawn from its application as beginning at station 1033/84.3 in Sec. 3, T. 3 S., R. 4 E., S.B.B. & M., but because this station is not indicated on the maps filed with the Department and because the whole of Sec. 3 is patented land over which the United States has no jurisdiction to grant a right-of-way, the station located on the west line of Sec. 3 has been selected as the location of the west end of the portion of the line to be withdrawn from the application."

Since a portion of the line for which the Manager held the company responsible has been withdrawn from its application and the application accordingly amended with the approval of the Department the company cannot be required to pay rentals for that portion. This case will therefore be remanded to the Manager of the Land Office with instructions that he recompute the rentals due on that portion of the right-of-way over public lands taking into account the amendment of the company's application and the withdrawal of the lands described in the Department's decision.

The Manager's refusal to approve that part of the company's application which involves the Indian lands was based upon the present regulation, 43 CFR 244.2, which provides:

> "The Bureau of Indian Affairs has jurisdiction over applications for rights-of-way over and upon Indian lands. All applications for the use and occupancy of Indian lands for right-of-way purposes should, therefore, be filed with the Superintendent in charge of the reservation on which the lands involved are situated, in accordance with the regulations contained in 25 CFR Part 256."

In 1944, after this application was filed, jurisdiction over applications for rights-of-way for the transmission of electric power over Indian lands was transferred to the Office of Indian Affairs.1/ In a memorandum for the Commissioner of the Office of Indian Affairs, dated February 28, 1945, the Commissioner of the General Land Office inquired whether the Indian Office desired to handle the matter of granting this right-of-way over Indian lands. The Acting Commissioner replied on May 2, 1945, that his office had no objection to the General Land Office's processing the application in its entirety. Since the transfer of jurisdiction over applications for rights-of-way occurred after this application was filed and since the regulation above-quoted was not then in effect, it will not be applied retroactively to require the refiling of this application for the Indian lands. S. J. Hooper, 61 I.D. 346 (1954); cf. Gilbert V. Levin, 64 I.D. 1,4 (1957) holding inapplicable changes in regulations which impose an additional obligation or burden on the party.

As to that portion of the transmission line over Indian lands, approximately 3.2 miles, the yearly rental of $17.00 has been paid through the year 1943. The rental due on those lands for the years 1944-57 is $238.00. Subject to the deposit of this sum at the Riverside Area Field Office of the Bureau of Indian Affairs, the concurrence of the Commissioner of the Bureau of Indian Affairs in this decision will

---

1/ Letter from the Assistant Commissioner, Office of Indian Affairs to the Secretary of the Interior, dated June 19, 1944, approved August 3, 1944.

constitute that agencies approval of the portion of this right-of-way application over the Indian lands involved. The Manager's decision is reversed and the case remanded for further action as directed.

Edward Woozley
Director

Fred H Massey
I concur:
Acting Deputy
Commissioner, Bureau of Indian Affairs

DISTRIBUTION:

Mr. H. M. Hammack, Attorney for the California Electric Company
Bureau of Indian Affairs
Lands Staff Officer
Appeals List No. 1
CCS

[illegible] : Mineral L

15

IN REPLY REFER TO: 1.03

1

MM 52

2 SFG BSC 512

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Area 1
Interior Building
P.O. Box 2861
Portland 8, Oregon

MAY 20 1959

Memorandum

Origin A550 files

To: State Supervisor, Sacramento, California
State Supervisor, Portland, Oregon
State Supervisor, Spokane, Washington
Assistant to State Supervisor, Los Angeles, Calif.

Distrib.

Return to

From: Area Administrator

Subject: Reimbursable Minerals Work for U. S. Bureau of Public Roads

Transmitted herewith for your information are copies, distributed as indicated below, of Circular Memorandum of March 9, 1959 to the Regional and Division Engineers of the U. S. Department of Commerce, Bureau of Public Roads from B. D. Tallamy, Federal Highway Administrator, subject: Right-of-way across unpatented mining claims on the Public Domain.

Your attention is directed in particular to the following excerpts from this Circular Memorandum:

> "The office of General Counsel advises that section 601 of the Economy Act (of June 30, 1932) provides adequate authority for Public Roads to request the Department of Interior to process these (mining claim validity) proceedings on a cost reimbursable basis upon receipt by Public Roads of requests from the States and their agreements to pay for such services subject to the usual Federal participation.
>
> "Since contest proceedings are handled by the Bureau of Land Management at the local level, authority is hereby delegated to the Regional Engineers - - - to make arrangements with the appropriate office of the Bureau of Land Management to make the necessary investigations and determine the validity of mining claims located on lands to be transferred to the States for rights-of-way on Federal-aid projects - - ."

Although the Circular Memorandum states that numerous requests have been made of BLM by State highway departments to assist in the right-of-way acquisition program by determining the validity of unpatented mining claims, we know of no such request by the highway department of any State in Area 1.

If, however, any such request has been made of your office and information given was not in accord with that given in the accompanying Circular Memorandum, it is suggested that the State Highway Department be informed it is the policy of the Bureau of Land Management to assist the right-of-way acquisition program on Federal-aid projects, but that this must be done on a reimbursable basis (through the Bureau of Public Roads) and that advance notice should be given the Bureau of Land Management of such work so that it can be scheduled with a minimum of disruption to other Bureau of Land Management work.

Prior to the initiation of such reimbursable work, however, the substance of the work to be done and the method of billing therefor must be documented by written agreement. If a single project or job is involved, a letter from the Bureau of Public Roads regional or division engineer outlining the work to be done and committing Bureau of Public Road funds therefor, with an acknowledgement by the Bureau of Land Management undertaking to do the work, is adequate. But for indefinite or continuing projects, a formal agreement similar to those now governing Bureau of Land Management's reimbursable minerals work for other federal agencies will be entered into and utilized as the basis for billing the Bureau of Public Roads for Bureau of Land Management's costs.

Area Administrator

Attachment: Circular Memorandum
Distribution: SO-Sacramento 5
SO-Portland 3
SO-Spokane 3
[illegible]-Los Angeles 3
Copies to: Director
Regional Solicitor

Washington 25, D. C.

LAND OFFICE
LOS ANGELES CALIF.
1959 MAY 21 AM

March 9, 1959

CIRCULAR MEMORANDUM TO: Regional and Division Engineers

FROM: B. D. Tallamy, Federal Highway Administrator
22-51 Washington, D. C.

SUBJECT: Right-of-Way Across Unpatented Mining Claims on the Public Domain

We have been advised that the Bureau of Land Management of the Department of the Interior has received numerous requests from the State highway departments of the various western public land States to assist in the acquisition of land for highway purposes where it is found necessary to acquire such a right-of-way across unpatented mining claims on the public domain.

The possessory rights acquired upon the location of a valid mining claim under the United States mining laws constitute property rights protected by the due process provisions of the Constitution against a taking or infringement without payment of just compensation, even though paramount title to such unpatented claims remains in the United States. However, such possessory rights attach only to claims located in accordance with the requirements of the mining laws and which have been perfected by a discovery of valuable mineral. Claims not so located and perfected are invalid and their attempted location creates no property rights which may be asserted against others who have acquired valid rights to the lands.

The Secretary of the Interior, through the Bureau of Land Management, is vested with authority to investigate the validity of mining claims and, if found invalid, declare them null and void. The Bureau of Land Management has frequently conducted such investigations for other agencies of the Government, and in proper cases, made such determinations of invalidity in order that their use of the lands might not be interrupted or interferred with by the assertion of invalid rights or claims under the mining laws. By reason of budget limitations these investigations and determinations for other agencies have necessarily been conducted on a reimbursable basis, except where notice has been given to the Bureau of Land Management sufficiently in advance that the costs may be reflected in its budget estimates.

The Bureau of Land Management has given consideration to the possibility of entering into agreements with the State highway departments under which it might perform these services and be reimbursed by transfer of State funds. However, section 601 of the Economy Act of June 30, 1952, as amended, under which it has performed these services for other Federal agencies on a reimbursable basis, does not contain authority for a similar arrangement with agencies outside the Federal Government, and that Bureau advises that it knows of no other authority which would permit it to accept such reimbursements from the States for these purposes.

While the Bureau of Land Management wishes to assist the several States in the accomplishment of their highway programs, it is without the necessary funds to undertake these extensive investigative programs at this time. However, the Bureau of Land Management has indicated that if Public Roads can supply the necessary funds it will be glad to make the investigations and determine the validity of the unpatented mining claims as requested by the States. The Office of the General Counsel advises that section 601 of the Economy Act provides adequate authority for Public Roads to request the Department of Interior to process these proceedings on a cost reimbursable basis upon receipt by Public Roads of requests from the States and their agreements to pay for such services subject to the usual Federal participation.

Since contest proceedings are handled by the Bureau of Land Management at the local level, authority is hereby delegated to the Regional Engineers of Region 5 (as to the States of North Dakota, South Dakota, Nebraska, and Kansas), Region 6 (as to the States of Oklahoma, and Texas), and Regions 7, 8, 9, and 10, to make arrangements with the appropriate office of the Bureau of Land Management to make the necessary investigations and determine the validity of mining claims located on lands to be transferred to the States for rights-of-way on Federal-aid projects, upon receipt of a request from the State highway department and its agreement to pay for such services, subject to the usual Federal participation. Reimbursement of the costs incurred by the Department of Interior should be made by a transfer of funds from the appropriation from which the project involved is being financed. The State's pro rata of the cost of such services, when determined, should be deducted from the next voucher submitted on the project in connection with which the services were rendered or from any other current project, being financed with the same class of funds. No advances should be made to the Bureau of Land Management without prior approval by the Washington Office. This authority may be redelegated to the Division Engineers.

Appropriate modifications to the Administrative and Policy and Procedure Memorandums will be made as soon as practicable.

3/25/59 RECORDED
DISTRIBUTION: One copy for office circulation and to general files.
One copy to Regional Engineer's control book...CHAMBERLAIN
One copy to Regional Right-of-way Branch.......MACFARLANE
One copy to Regional Design Branch.............ADKISON
One copy to Reg. Constr. & Maint. Branch.......BEACH
One copy to Administrative Branch..............ANDERSON
One copy to Federal Hwy. Projects Office.......HARRINGTON

Eight copies sent to each of the four divisions.

DOCKET FILES

RIGHTS-OF-WAY * 1 Generally

PUBLIC LANDS * 4 Indian Lands

A decision rejecting an application for a right-of-way for an electric transmission in so far as it involves lands indicated to be Indian lands on the records, will be reversed where it is determined that the lands in question are in fact lands of the United States by virtue of an agreement whereby the Indians relinquished all rights and interests therein to the United States.

Imperial Irrigation District, Los Angeles 0164552 (September 2, 1960)

In reply refer to:
Los Angeles 0164552
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 2, 1960

DECISION

Imperial Irrigation District	:	Right-of-way Application
	:	
	:	

Decision Reversed
Case Remanded

The Imperial Irrigation District has appealed from a decision of the Acting Manager, Los Angeles Land Office, dated November 30, 1959, rejecting in part its above-identified application for an electric transmission line right-of-way to be situated in Secs. 23, 24, and 25, T. 16S., R. 21 E., S.B.M. California, filed pursuant to the Act of February 15, 1901 (43 U.S.C. sec. 959). The application was rejected as to that portion of the proposed right-of-way for the reason that it involves land located within the Yuma Indian Reservation under the jurisdiction of the Bureau of Indian Affairs.

The appellant contends in substance that the land over which the rejected portion of the right-of-way extends is not located within the Yuma Indian Reservation. In its reason for appeal it states that on or about December 4,1893, a written agreement was executed by the Yuma (Ouechan) Tribe of Indians and the United States, whereby the land in question, along with other lands, was surrendered and relinquished by the Indians to the United States and that this agreement was accepted, ratified and confirmed by the Congress in August of 1894 (28 Stat. 332). The appellant also asserts that Solicitors Opinion, M-28198, dated January 8, 1936, considered the agreement of 1893 and the act of 1894 and decided that said lands were not a part of the Indian Reservation. It is urged that said opinion should apply with equal force to the similarly situated lands involved in its appeal and that the decision of the Acting Manager should be reversed and its application for a right-of-way over the land in question be granted.

The contentions of the appellant have merit. The Yuma Indian Reservation in California established by an Executive Order dated January 9, 1884, included the land herein in question along with other lands. Under the agreement of December 4, 1893, the Yuma Tribe of Indians surrendered and relinquished all of its rights in the land embraced in the Yuma Indian Reservation to the United States. By an act of Congress dated August 15, 1894, the agreement made with the Indians on December 4, 1893 was ratified and confirmed. The act confirming the agreement provided that each member of the Yuma Indian Tribe would be allowed to select five acres (later changed to ten acres) of irrigable land in the area surrendered, as an allotment. When all of the members of the tribe had received an allotment, the remainder of the irrigable portion of the land was to be appraised and sold to white settlers. The nonirrigable portion of the land was to become part of the public domain at such time as it was classified as being nonirrigable, effective as of the date of the agreement of the Indians to relinquish their rights in such lands. The nonirrigable portion of the lands were not to be opened to entry under the general land laws until so directed by Presidential Proclamation.

The Bureau of Indian Affairs reports that the only lands in the Yuma Indian Reservation that are subject to its jurisdiction at the present time are those that have been alloted to individual Indians that still remain in trust, and a small acreage of land which has been restored to the tribe pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984). The lands under the jurisdiction of the Bureau of Indian Affairs do not include those involved in the appellant's right-of-way application. The lands affected by the application in the instant case are part of the lands that reverted to public land status by outright cession in accordance with the terms of the 1894 agreement, and although they are within the exterior boundaries of the Yuma Indian Reservation these lands are under the jurisdiction of the Bureau of Land Management. Therefore, the lands in question are subject to the grant of the right-of-way as applied for, all else being regular.

Accordingly, the decision of the Acting Manager is reversed and the case remanded to the Manager through the office of the Assistant to the State Supervisor for California at Los Angeles for appropriate action consistent herewith.

Acting Director

DISTRIBUTION:

Imperial Irrigation District (Regular Mail)
Horton, Knox, and Carter, Attorneys for Appellant (Regular Mail)
Lands Staff Officer
Appeals List No. 1
RBO

DOCKET FILES

In reply refer to:
6.05c
Riverside 02383

DEPT. OF INTERIOR
SACRAMENTO, CAL.
OCT 11 10 09 AM 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

September 10, 1963

DECISION

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

Roland J. Roy Inc. : Right-of-Way Application
:
:

Decision Affirmed

Roland J. Roy, Inc. has appealed from a decision of the Riverside Land Office, dated June 3, 1963, rejecting its application for a right-of-way for the reason the Federal Aviation Agency has interposed an objection to the approval of the communication facilities proposed by this appellant.

The appellant bases its appeal upon a letter received from the Federal Aviation Agency, dated January 22, 1963, which discloses that it has no objection to either the location or the proposed antenna structures which are the subject of the appellant's application.

The January 22, 1963, letter has been superseded by a letter of July 18, 1963[1] from the Federal Aviation Agency stating that the land involved was withdrawn for the Agency's specific use and it objects to Roland Roy's occupancy because it will interfere with their operation.

The Department has held that land withdrawn for the use of a governmental agency is not subject to lease by others without the consent of that agency. Joseph E. Thompson, A-28107 (August 26, 1960). Thus, the objection of the Federal Aviation Agency is conclusive.

Accordingly, the application for the right-of-way was properly rejected and the decision is affirmed.

This constitutes the final administrative determination by the Department in this matter. See 43 CFR 221.31.

Assistant Director

Approved: September 25, 1963

Assistant Secretary of the Interior

1/ Bureau records show that the applied-for land was withdrawn from entry on September 3, 1958 as an air navigation site. See order Los Angeles 0152528.

DISTRIBUTION:
Roland J. Roy, Inc.
Division of Lands and Recreation
Appeals List No. 1
MHS

DOCKET FILES

DEPT OF INTERIOR
SACRAMENTO, CAL.

DEC 26 10 08 AM 1963

BUREAU OF
LAND MANAGEMENT

In reply refer to:
6.05c
Los Angeles 0166402
December 13, 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Motorola Communications and Electronics, Inc. : Right-of-way Application

Decision Affirmed as Modified

The above-named party has appealed from a decision of the Manager, dated January 11, 1963, wherein additional rentals were required before formal approval of the above-identified right-of-way application could be consummated. The decision also set forth certain stipulations as follows to govern the use of the lands when the formal right-of-way is granted:

> 1. The access road ingress and egress right-of-way to the site is a nonexclusive right-of-way and will be available for public use as recommended by the Fish and Wildlife Service, U.S. Department of the Interior.
>
> 2. Nothing herein authorizes the grantee to allow use either of unoccupied areas or improvements placed on ground by grantee.
>
> 3. The applicant hereby agrees to report the names of any present or future additional users of the site or facilities thereon.

The appellant contends, in substance, that (1) the prohibition imposed regarding use by others of improvements placed on the ground is unreasonable, and (2) the rental charge is excessive. The appellant argues, among other things, that the practical effect of the Manager's decision is to damage its competitive position and make its continued use of the right-of-way economically unfeasible.

There is nothing in the statute or the regulations thereunder, (43 U.S.C. sec. 961; 43 CFR 244 et seq), under which the appellant has applied for a right-of-way, which specifically permits the grantee to authorize the use of the right-of-way facilities or for the installation of additional facilities by third parties. Nor is the grant of a right-of-way easement, permit, or license of such a nature that it can be subleased by third parties. If other persons desire to use public lands for the purposes contemplated by the appellant, it is necessary that they make application to the appropriate Bureau office for such right-of-way on their own behalf. A right-of-way easement, permit, or license, once granted, may be assigned by the grantee to another party. Such an assignment must, however, be approved by the appropriate officer of the Bureau. In the circumstances, it is not necessary to interject the above-mentioned stipulations numbers two and three in any right-of-way easement that may be granted to the appellant. Stipulation number one, however, appears to be necessary in any right-of-way easement that may be granted to the appellant. Accordingly, the decision appealed from is modified to eliminate the requirement that stipulations numbers 2 and 3 be made part of the right-of-way grant.

With respect to the rental set forth in the decision appealed from, the records show that the appellant was granted permission to commence construction of improvements on the land in question in advance of formal approval of a right-of-way by letter dated November 1, 1960. It appears that the rental established for use of the right-of-way under the advance permission was at the rate of the minimum rental of $50 per calendar year as provided for by the regulation 43 CFR, 1958 ed., 244.21, in effect at the time advance permission was granted. The appellant has paid rentals in the amount of $50 for each year in advance for the years 1960, 1961, 1962, and 1963, plus an additional amount of $5 for the year 1960. The new rental rate of $300 per year, as set forth in the decision appealed from, is based on the rental schedule presented in the Bureau's General Communication Site Appraisal for the Southern California Region effective June 1, 1962. On this basis, the subject land was determined to be a Class III site. Because of the remoteness of the site as to access, power and serviceability, the lowest value of the schedule range was used and the base rent set at $300 per year. The appraised rental fee was established on the fair market value of the easement, in accordance with the applicable regulation 43 CFR, 1963 ed., 254.21,(a), as amended on November 16, 1961 (Circular 2069, 26 F.R. 10728).

We believe that the rental in the amount of $300 as based on the fair market value of the easement was established in accordance with the standards of the Bureau, the value estimate given is reasonable and is based on the best information available. The appellant has not presented any positive or substantial evidence that the rental rate is either in error or unreasonable.

However, we are of the opinion that the new rental rate of $300 per year cannot be applied retroactively to the years 1960, 1961, 1962 and 1963 because the rental for these calendar years appears to have been correctly established at $50 per year under the advance permission granted to the appellant. The right-of-way easement should, in this case, be approved subject to the payment of the advance rental in the amount of $300 for the annual period involved, less the amount of $5 additional rental paid for the year 1960, or a total of $295. This amount must be paid before the formal easement may be granted. See 43 CFR 244.21(a)(1). The amount of rental to be paid in advance for subsequent years will be $300 per year, subject to any periodic adjustment that may be made in accordance with the applicable regulations. The decision appealed from is modified accordingly.

The decision appealed from is, therefore, affirmed as herein modified.

When this decision becomes final the case will be remanded to the Manager, through the Bureau's office of the State Director for California, for formal approval of the right-of-way easement as specified herein, upon payment of the advance rental for the first year as specified above.

Motorola Communications and Electronics, Inc., is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington D.C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Motorola Communications and Electronics, Inc. (Certified Mail)
Division of Lands and Recreation
Appeals List No. 1
BRA/RBO

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO CAL.

JAN 31 10 00 AM 1964

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Los Angeles 0164638

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

January 27, 1964

Certified Mail
Return Receipt Requested

DECISION

The Atchison, Topeka and Santa Fe Railway Company : Right-of-way (Railroad Station Ground Site)

Decision Affirmed in Part; Reversed in Part

The Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as the appellant) has appealed from a decision of the land office at Riverside, California, dated August 2, 1963, rejecting its above-identified right-of-way application. The rejection was for the reason that the land applied for is not adjacent to the appellant's railroad right-of-way as contemplated by the Act of March 3, 1875 (18 Stat. 432; 43 U.S.C. 934), under which the application was filed; and the use proposed to be made of the site is not authorized by the Act.

The appellant proposes to use the site, which is located more than five miles from the location of the railroad right-of-way, for the disposal of waste oil and sludge from the cleaning of its diesel engines and rolling stock. The oil and sludge is to be burned on the site.

The appellant contends, on appeal, among other things, that (1) the site is adjacent to its right-of-way within the meaning of the Act, and (2) the use of the land as proposed is one which would come within the scope of said Act. The appellant also asserts that it needs the land because in a recent court suit it was enjoined from disposing of diesel oils and other waste materials in the immediate vicinity of its Barstow,California, terminal. The appellant argues that there is no decisions dealing with the term "adjacent" as found in 43 U.S.C. sec. 934, holding that adjacent means "contiguous or abutting", but on the contrary, they hold that adjacent means "in proximity to or near or in the neighborhood of." The appellant also argues that the use of the land obtained under the subject Act does not limit the use thereof strictly to that for station buildings, depots, machine shops, side tracks, turnouts, and water stations. The appellant cites a number of court decisions purportedly to sustain its arguments.

It is conceded that the use of the land applied for may not be limited strictly to station buildings, depots, machine shops, side tracks, turnouts, and water stations. The use of the land as proposed by the appellant could conceivably be considered as a necessary function to maintain its diesel engines and other rolling stock in conjunction with its machine shops, etc. In this respect, it has been held that the use of station grounds acquired under the Act of March 3, 1875 is not restricted to the uses specifically mentioned in the act, but may, upon a clear and definite showing of necessity therefor, include any use legitimate to the general business of railroading as carried on by railroad companies generally serving the company. See Western Pacific Railway Company, 41 L.D. 599 (1913). The decision appealed from is, therefore, reversed insofar as it rejected the application for the reason that the use contemplated by the appellant is not authorized by the Act.

We cannot agree with the appellant, however, that the land applied for is subject to acquistion for the proposed use as contemplated by the Act. It has been well established that the right of selection of land for the purposes of constructing station buildings, machine shops etc., is limited to lands adjoining the company's right-of-way theretofore acquired. (Emphasis supplied). Cf. Grand Island and Northern Wyoming Railroad Company, 14 L.D. 117, 414 (1892). While the act does provide for the removal of material from adjacent public land in connection with the construction of the railroad, which land need not adjoin the railroad right-of-way, as argued by the appellant, such use cannot be equated with the use of the land for station grounds, etc, since the right to take materials from the public lands under the act does not involve permanent occupancy or appropriation of the ground, as is contemplated by the appellant in the instant case.

Therefore, the application must be rejected for the reason that the land does not adjoin the right-of-way of the appellant. The decision appealed from is, accordingly, affirmed as modified.

The appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulation contained in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington D.C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
The Atchison, Topeka and Santa Fe Railway Company (Certified Mail)
Division of Lands and Recreation; Appeals List No. 1; RBO

DOCKET FILES

In reply refer to:
6.05c
Sacramento 074566

DEPT. OF INTERIOR
SACRAMENTO, CAL.
MAR 4 10 00 AM 1964
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

February 28, 1964

DECISION

Paul E. Boer : Right-of-way Application
: (Radio Transmitter Site)
:

Decision Vacated
Case Remanded

Mr. Paul E. Boer has appealed from a decision of the land office at Sacramento, California, dated April 26, 1963, rejecting his above-identified right-of-way application for a radio transmitter site for certain land located on South Fork Mountain in T. 32 N., R. 6 W., MDM, California. The application was rejected for the reason that the United States Bureau of Reclamation had filed an application, Sacramento 074022, for a withdrawal, of some 65 acres in the same area including the land applied for by Mr. Boer, from all forms of entry or disposal including the mining, but not the mineral leasing laws. The purpose of the withdrawal was to allow unrestricted use of the land by the Bureau of Reclamation for a VHF-UHF repeater station in connection with its operations in the Sacramento River watershed.

Subsequent to the filing of the appeal, it has been determined that the specific needs of the Bureau of Reclamation can be reduced to an area of 24 acres, and that the remainder of the 65 acres in question should remain open to other interested parties, including Federal agencies, for radio transmission purposes. Accordingly, the withdrawal of the area as proposed by the Bureau of Reclamation was modified to the extent that the land would be withdrawn only from prospecting, location, entry and purchase of any minerals therein under the mining laws, and the land was so withdrawn by Public Land Order No. 3249 of October 10, 1963.

In view of the above facts, the decision rejecting the right-of-way application of Mr. Boer is hereby vacated and the case is remanded to the Manager through the Bureau's office of the State Director for California for further appropriate consideration.

Richard J McCormick
Chief, Branch of Land Appeals
Division of Appeals

DISTRIBUTION:
Mr. Paul E. Boer
Hon. Clair Engle, United States Senate
Division of Lands and Recreation
Appeals List No. 1
RBO

DOCKET FILES

In reply refer to:
6.05c
Riverside 01247

APR 20 10 09 AM 1964

BUREAU OF
LAND MANAGEMENT

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 15, 1964

DECISION

Southern California Edison Company	:	Right-of-way
	:	
	:	Decision Vacated Case Remanded

The Southern California Edison Company has appealed from that part of the decision of the Land Office at Riverside, California, dated October 15, 1963, which requires it to agree to the stipulation contained in 43 CFR 2234.4-1(c)(5), 29 F.R. 4444, March 31, 1964 (formerly 43 CFR 244.44(e)), in connection with its right-of-way application, Riverside 01247.

The appellant, in its appeal, specifically objects to the requirements of the regulation 43 CFR 2234.4-1(c)(5), _supra_, of the regulation, as it pertains to the filing of a stipulation in connection with utilization of the surplus capacity of the proposed transmission line by the United States.

Subsequent to the filing of the appeal, the subject application, which involves a transmission or distribution of electric power and energy of over 33 kilovolts, was referred to the Secretary of the Interior, through the Assistant Secretary for Water and Power Development, to determine the relationship of the proposed facilities to the power marketing program of the United States and provided for by the regulation 43 CFR 2234.4-1(c)(3) (formerly 43 CFR 244.44(c)). The Assistant Secretary for Water and Power Development has determined that there is no conflict in the construction of the proposed facilities and marketing program of the United States, and the provisions of the regulations 43 CFR 2234.4-1(c)(5) and 2234.4-1(c)(3), _supra_, have been waived insofar as the subject application is concerned.

The waiver of the wheeling stipulations in this case was based on the fact that, although the applicant had not received formal approval of its right-of-way prior to the issuance of the regulations 43 CFR 2234.4-1(c)(3) and 2234.4-1(c)(5), _supra_, construction of the facility had commenced a considerable time prior to the effective date of the regulations and for all practical purposes only routine processing action of the formal approval remained to be accomplished.

Accordingly, the decision appealed from is vacated and the case remanded to the Manager through the Bureau's office of the State Director for further processing of the formal application in accordance with the applicable regulations, and subject to payment of any fees and rentals due.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

DISTRIBUTION
Southern California Edison Company
Division of Lands and Recreation
Appeals List No. 1
RBO

Appeal to Sec
affirmed A.30325
11-3-64

In reply refer to:
704
Los Angeles 096498

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

May 28, 1964

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 JUN 8 AM 10 00

Certified Mail
Return Receipt Requested

DECISION

DOCKET FILES

Southern California Edison Company : Application for Amended Right-of-Way: Increased Transmission Line Capacity.

Decision Affirmed

The Southern California Edison Company has appealed from a letter-decision of the Riverside Land Office, dated January 2, 1964 1/. That decision held that further action on the Company's request to convert its existing 33 KV right-of-way to a 115 KV right-of-way will be held in abeyance until the applicant files a stipulation in the Land Office, pursuant to the requirements of departmental regulation 43 CFR 2234.4-1(c)(5), 1964 Special Supplement (formerly 43 CFR 244.44(e)).

The appellant's original application herein, filed on January 8, 1963, requests that its existing right-of-way easement under the Act of March 4, 1911, upon and across public lands in Kern County, California for its 33 KV Inyokern-Ridgecrest transmission line, be amended to permit the reconstruction, enlargement, conversion and operation of said line at 115 KV. The remaining period of that existing easement is 40 years; the total length of the expanded right-of-way requested across public lands is 1.87 miles; the total length of the Inyokern-Ridgecrest line is 28.69 miles.

The regulation in question, as amended by Circular 2100, published March 23, 1963 (28 F.R. 2905), provides, among other things, that applicants for transmission line right-of-way permits shall execute a stipulation allowing the government to utilize any surplus capacity in such transmission facilities crossing Government lands. The appellant declined to execute such stipulation. It here appeals the Land Office Manager's decision declining to consider the appellant's application further absent such stipulation, and prays that the easement requested be granted forthwith.

The appellant claims the regulations cannot be applied to it for the following reasons (in the order presented by the appellant):

I. They are prospective and do not apply to appellant's application.

1/ The decision was addressed to the original applicant, the California Electric Power Company, which merged with the Southern California Edison Company on December 31, 1963, and, thereupon, terminated its corporate existence.

II. They are contrary to law and the Constitution in that:

A. They exceed the authority of the Secretary;

B. They are unconstitutional administrative legislation, and violate the Due Process Clause;

C. Applicant's freedom to reject permits made subject to the regulations does not cure the invalidity thereof;

D. They are contrary to the intent and rate provisions of the Federal Power Act.

III. They are ambiguous, uncertain, and impractical.

* * * * *

As to argument I, the appellant says its January 8, 1963, application complied with the regulations then in effect, and that the regulations promulgated March 23, 1963, do not apply to applications filed prior thereto. As amended March 23, 1963, Sec. 244.44(e) of the regulations (now 43 CFR 2234.4-1(c)(5)), provides, among other things, that an applicant for a permit must ". . . execute and file with its application a stipulation . . ." allowing the Government to use the surplus capacity of the transmission line. We agree that the amendment is prospective. But the subject of the amendment relates to permits, not applications. The subject of the amendment is: terms and conditions in permits issued on or after March 23, 1963. The Department has found that permits should not be issued for transmission lines on Government lands after that date unless applicants allowed the Government to use the lines' surplus capacity. The reference (in the regulation) to applications merely states how applicants may meet these terms and conditions. 2/ Nor is there a problem of retroactivity here. "No vested right in a [transmission line right-of-way] grant is acquired by the filing of an application." (See California Electric Power Company, 58 ID 607 at 611 (1944), and cases there cited.) The record does not show that the capacity in question lawfully was in-place or under construction on March 23, 1963. In short, the filing of the application did not operate to prevent the Secretary from granting appellant a permit subject to conditions prescribed by regulations issued, pursuant to statutory authority, shortly after the appellant applied for a permit.

The appellant next argues (II-A above) that the acts of 1901 and 1911, under which the regulations were promulgated, do not support them; that (II-B) therefore, they are unconstitutional administrative legislation; and that

---

2/ Subsequent to the Land Manager's decision of October 11, 1963, the appellant, on October 17, 1963, supplemented its January 8, 1963, application by filing the power line diagrams required by Sec. 244.43(d) as amended March 23, 1963 (presently 43 CFR 2234.4-1(b)(4)(IV)).

these two conclusions are corroborated by the fact that similar departmental wheeling regulations were withdrawn in 1954 because they were considered illegal by the then departmental Solicitor, and by the fact that bills to enact those regulations into law after they were withdrawn were introduced but not considered by the Congress. Under II-A, the appellant asserts that the act of 1901 (cited with the 1911 act by the amended regulations as supporting authority therefor) "has no bearing in this case" because the appellant applied for a permit under the 1911 act. The 1911 law, authorizing the issuance of 50-year permits, was enacted because the 1901 Act, which authorized the issuance of revocable permits only, did not provide sufficient investment security. We believe the act of 1901 has bearing insofar as the appellant argues that the act of 1911 does not authorize the subject regulation. 3/

The appellant misconstrues the 1911 act. A law of May 14, 1896 (29 Stat. 120) dealt with rights-of-way on the public domain for electric power purposes. The act of 1901 "superseded and took the place of the law of May 14, 1896. The act [of 1901] . . . carefully defines the extent of such rights-of-way and embodies provisions not found in any of the earlier enactments." 4/ "It would seem difficult to conceive of a statute couched in terms which would retain a larger measure of public control" than the 1901 statute. 5/ The 1911 act made no change in the 1901 act other than authorizing the granting of easements for up to 50 years. As explained by Representative Scott, the House floor manager of the bill that became the 1911 act,

> "it changes existing law only to this extent, that it provides that a permit may be issued for rights-of-way for the purposes specified for a fixed term of 50 years, whereas the present law requires all such permits to be revocable at the will of the authority granting them. * * * [U]nder this a right-of-way may be granted for a period of 50 years, under such regulations as the head of the department may make." 6/

The act of 1911, thus deals "specifically and solely . . . with rights-of-way for transmission lines." 7/ That act and two others 8/ "occupies a special field

---

3/ Evidently the appellant really believes so, too, for, elsewhere in its brief, it cites court comment on the scope of regulations that may be issued under the 1901 act, as determinative of the scope of regulations that may be issued under the 1911 act (U. S. v. Colorado Power Co., 240 F. 217 at 221 (1916).

4/ Utah Power and Light Co. v. U. S., 243 U.S. 389 at 407 (1917).

5/ 32 Opinions of the Attorneys General, 525 at 526 (1921).

6/ Conference Report on H.R. 31596 in the 61st Congress, 3d Sess. and explanation to the House thereof, at 46 Cong. Rec. 4014-15 (Mar. 2, 1911).

7/ 30 Opinions of the Attorney General 581 at 583 (1916)

8/ 31 Stat. 790, authorizing the Secretary to regulate the construction of electrical plants, poles and lines on public lands, forests, and certain reservations; and 33 Stat. 628, authorizing the Secretary to regulate the construction of dams and reservoirs on forest reserves.

carved out of the comprehensive uses and occupancies embraced by the act of 1897. In the fields to which they relate, their provisions are comprehensive and complete . . . These acts, therefore, bear to the act of 1897 the relation of special and particular to general legislation." 9/

The act of 1911, therefore, by background, emphasis and intent is uniquely an electric power transmission line act as well as a right of way statute. It was carefully constructed and enacted for the purpose of controlling the conditions under which transmission lines in particular should be placed on the public domain. Its intent is that such lines not be placed thereon by right and at random. Its intent on its face is that transmission lines be placed on Government lands under the terms and conditions the Government department responsible for the over-all welfare of those lands believes transmission lines should be placed thereon.

Where the permit is to endure for fifty years and is not to be revocable at the will of the Government, the act requires such regulations as will protect Government interests associated with Government lands for the next 50 years. Had the Sixty-first Congress intended permits to be issued summarily -- had it intended them to be issued if the applicants met the one, two, or three standards the Sixty-first Congress in March 1911 thought should govern the placement of transmission lines on Government lands -- the Sixty-first Congress would have said so. It legislated differently. Having stated its specific purpose and intent, Congress directed the departments responsible for Government lands to treat by such regulations as they in their expertise deemed appropriate, such developments and exigencies that should materialize during the life of the law that affected the placement of transmission lines on Government lands.

We think a regulation requiring a permittee to let the Government use surplus capacity in a transmission line permittee would build on Government's lands, is uniquely within the purview and intent of the 1911 transmission line act. The use of the transmission lines of one electric system to wheel, convey, or market the power and energy of and for another system is a widespread, long-established operating practice in the power industry. So is the interconnection and the joint use of transmission facilities by two or more different systems; and so is the purposeful over-building of transmission line capacity in anticipation of future load growth. 10/

9/ 30 Opinions of the Attorneys General at 583. (The act of 1897 referred to, 30 Stat. 11, 35, authorized the Secretary to regulate the occupancy and use of public forests.)

10/ See, for example, Report on the Status of Interconnections and Pooling of Electric Utility Systems in the United States, prepared by Edison Electric Institute, July 1962; revised May 1963.

See also 8 FPC 1177 at 1181-1183 (1949); as modified at 9 FPC 399; and as affirmed in Federal Power Commission v. Idaho Power Co., 344 U.S. 17 (1952).

The Federal Government is the largest wholesale producer of electric power and energy in the Nation. Its installed generating capacity of about 26 million kw comprises 17 per cent of all electric utility generating capacity in the country. Its installed hydroelectric capacity accounts for about 45 per cent of the Nation's developed hydroelectric capacity. We are advised by the Assistant Secretary, Water and Power Development, that another 8.8 million kw of Federal generating capacity is under construction; and still another 10.2 million kw has been approved or authorized for future construction. The statutes under which this Federal power and energy is produced require that preference in the sale thereof be given to governmental agencies and to non-profit organizations. This requirement originated contemporaneously with the transmission line right-of-way laws in question. It began with Section 5 of the Act of April 16, 1906 (34 Stat. 116 and 117), requiring the Secretary of the Interior to give preference to municipal purposes when disposing of power produced at Federal reclamation projects in the western United States under the Act of June 17, 1902 (32 Stat. 388). 11/ It was restated by the Act of February 24, 1911 (36 Stat. 930); and it has been affirmed by a long series of statutes enacted and re-enacted down to the present. To avoid constructing the transmission lines needed to market this power and energy, 12/ the Government utilizes the transmission facilities of other systems to the maximum extent practicable. 13/ This wheeling service that utility systems perform for the Federal Government is based on "the principle of coordination and cooperation . . . the very purpose of which is to make use of company transmission line facilities to avoid duplication and waste of Government funds" for transmission lines. 14/

11/ See 30 Opinions of the Attorneys General 197 (1913).

12/ "The alternative method is to sell the . . . energy at the dam, and the market there appears to be limited to one purchaser, the . . . Power Company." Ashwander v. TVA, 297 U.S. 288 at 339 (1935).

13/ See, for example, Sec. 5 of the Flood Control Act of 1944, 48 Stat. 887 at 890, 16 USC 825s: "The Secretary is authorized . . . to construct or acquire . . . only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions . . . the Federal Government, public bodies, cooperative, and privately-owned companies."

See also the Act of August 31, 1951, 65 Stat. 248 at 254: "No part of the appropriation [for the Bureau of Reclamation] shall be used to initiate the construction of transmission facilities within those areas covered by power wheeling service contracts which include provision for service to Federal establishments and preferred customers . . ."

14/ Pacific Gas & Electric Company President's testimony on "Transmission Lines" during Senate Appropriations Committee Hearings on H.R. 3790, 82d Congress, page 1878 (1951).

In substance, the contested regulation 15/ (43 CFR 244.44(e)(2); now 43 CFR 2234.4-1(c)(5)) provides that the Government may have the use of any surplus capacity in that segment (from substation or interconnection point to substation or interconnection point) of a permittee's transmission line crossing public lands; and that the Government may increase the capacity of that segment. Any disagreement on surplus capacity is to be adjudicated by a three-man board (subparagraph (x)); and when for his own operations the owner needs to recover his surplus capacity, he must give the Government three years notice (subparagraph (ix)). In using the segment, the Government may not unreasonably interfere with the owner's operations (subparagraph (vi)); it may not, without the owner's consent, use his surplus capacity to supply customers the owner was serving when he applied for the permit, unless they are preference customers (subparagraph (vii)); and the Government must pay an equitable share of the segment's costs for any use it may make thereof (subparagraph (viii)). All these provisions may be modified by supplemental agreements (subparagraph (xii)).

We believe the regulation is neither unreasonable nor beyond the intent of the 1911 act. The regulation treats matters uniquely and peculiarly characterist of transmission lines; the 1911 act expressly "authorizes and empowers" the Secretary to treat such matters by regulation. We also believe the 1911 act does not violate the rules regarding the nondelegability of legislative power. The Supreme Court has stated: "That Congress intends there shall be some administrative regulations on the subject is plainly shown in the [1901] act, and that its discretion in the matter is not narrowly confined is shown by our decisions in United States v. Grimaud, 220 U.S. 506, and Light v. United States, supra." 16/ "It was not necessary for Congress to ascertain the facts of or to deal with each case. The act went as far as was reasonably practicable under the circumstances existing." 17/

15/ We find it unnecessary to consider the appellant's objections to the references in the regulation, 244.44(c), to the "power marketing program of the United States." By letter of January 2, 1964, the Assistant Land Office Manager informed applicant that this Department's Assistant Secretary, Water and Power Development, formally found "no conflict between [applicant's] proposed . . . facility and the power marketing program of the United States."

16/ Utah Power & Light, at 410, supra, responding to defendants' arguments that the regulations under the Act of February 15, 1901, were "unconstitutional, unauthorized and unreasonable."

17/ United States v. Chemical Foundation, 272 U.S. 1 (1925). Comparison of the statute and stipulation involved in Chapman v. El Paso, 204 F 2d 46 (1953) with the subject statute and stipulation, shows that Chapman is inapposite here. The Chapman stipulation is printed in full at 204 F. 2d 49-50. Unlike Chapman, "we are . . . dealing here with an order which seeks to compel the granting of a license in futuro or the modification and alteration of conditions embodied in the license prior to its issuance." (ibid at 53). The stipulation here does not undertake "to exercise so vast and so detailed a power;" nor "such intimate regulation of corporate affairs as the financing, construction and employment of facilities." (at 51)

Contrary to appellant's assertions, the 1955 testimony of the then Under Secretary of the Department before a Subcommittee of the House Government Operations Committee, does not show that similar departmental wheeling regulations were withdrawn in 1954 because it was believed they were "unlawful." His testimony was that the issuance and rescission of those regulations "is a subject of administrative discretion on which the Secretary is free to act according to his judgment;" 18/ and that the 1954 withdrawal "involved [matters of] administrative discretion rather than of law." 19/ The "lawfulness" of the regulations previously had been fully explored, adjudicated and upheld in a Memorandum Opinion of June 2, 1952 by the United States District Court for the District of Columbia, in the unreported case of Idaho Power Co. v. Chapman (Civil Action No. 4540-50); and in a Supplemental Memorandum of that Court on October 31, 1952. 20/ We also disagree with the inference the appellant draws from the failure of Congress to consider bills to enact those regulations in statutory form after the withdrawal thereof in 1954. The only legal inference that may be drawn therefrom is that the 84th Congress was content to have the matter treated under the 1911 Act as the Sixty-first Congress intended it be treated; namely, as a subject of administrative discretion. We do note, though, that when Congress amended the 1911 Act in 1952 to increase (from 40 feet) to 400 feet the width of transmission line rights-of-way that could be granted across public lands, no disapproval was expressed of the well-known transmission line wheeling regulations applicable to all such rights-of-way since 1948. 21/

The appellant next argues that insofar as the regulation requires the permittees to allow the Government the use of the entire segment, from substation or interconnection point to substation or interconnection point of a transmission line that crosses public lands, the regulation operates constitutionally to deprive a permittee of its property without due process of law in the portions of that segment not on public lands, but which extend from the borders thereof to the nearest line substation or interconnection point.

18/ Hearings on "Certain Activities Regarding Power, Department of the Interior (Changes in Power Line Regulations)," 84th Congress, page 232.

19/ Ibid, at 237.

20/ The "Memorandum of Court" together with separate "Findings of Fact and Conclusions of Law," "Amended Findings of Fact and Conclusions of Law," plus the Supplemental Memorandum of Court" are printed in Hearings, supra, at pages 88 through 93.

21/ S.1630 as introduced in the 82d Congress in May, 1951; amended and reported by the Senate Committee on Agriculture and Forestry in March, 1952 in Senate Rept. 1224; further amended and reported by the House Committee on Agriculture in May, 1952, in House Report 1848; and approved as Public Law 367 of the 82d Congress on May 27, 1952, 66 Stat. 95.

We do not agree with the appellant. This aspect of the regulation is reasonable because the portions of the segment in question are inseparably related to the portions of the segment on Government land; the use of the surplus capacity in the segment portions in question in no way interferes with the owner's use of those portions or damages their efficiency; and the alternatives to this aspect of the regulations -- constructing a parallel Government line, or tapping into a permittee's line at the points where it would enter and leave Government lands -- would not be economic either to the Government or to the permittees. This aspect of the regulation is fair because allowing the Government to use the permittee's surplus capacity in such segments is balanced by allowing the permittee to place segments on the Government's lands. This aspect of the regulation is the result of the due processes of the law because, as previously shown, the condition is one of those inherent characteristics of transmission lines that the law expressly authorizes and empowers the Secretary to control by regulation. We find that this aspect of the regulation would not operate "to take property of Appellant without . . . the payment of just compensation in violation of the Fifth Amendment," because subparagraph (viii) of the stipulation in question expressly says the Government will pay the owner "an equitable share" of the cost of the line segment for any use the Government may make thereof. 22/ And we do not anticipate that the application of that subparagraph, or any of the other subparagraphs of the stipulation, will violate the intent and rate provisions of the Federal Power Act, as amended (16 USC 792 et seq.). Contrary to the appellant's claims (II-D above), the Secretary's statutory authority and responsibility to set the terms and conditions at issue hereunder which transmission lines 23/ shall be placed on public lands, plainly is not displaced by or in any way repugnant to Federal and State public utility laws regulating the sale or transmission of electricity.

22/ United States v. Colorado Power Co., 240 F 217 (1916), is not apposite. The Power Company there claimed its rights to occupy government lands did not flow from the act of February 14, 1901; and that such act did not authorize the imposition of annual occupancy charges. The Court held that the 1901 act applied, and that it authorized the imposition of annual charges. Then, at page 221, it added that for the Secretary to promulgate a regulation subjecting Power Company's business "to examination as to the amount of electrical energy produced and disposed of, for the purpose of laying tribute thereon as a basis of a charge to be fixed by the Secretary, is to carry the power granted to him [to fix regulations] to a doubtful length and further than, I think, is given by the [1901] Act." No question of the reasonableness of the annual occupancy charges to be paid on appellant's enlarged line is present here.

23/ Other than primary transmission lines as defined at Section 3(11) of the Federal Power Act, 16 USC 796.

Finally (III above), the appellant argues that the regulations are ambiguous, uncertain, and impractical because (a) it is difficult to determine what is "surplus" transmission line capacity, and to forecast when it should be recovered; and (b) the regulations do not make clear (i) the nature and extent of a permittee's obligation to maintain its facilities on public lands in good condition after the Government makes interconnection therewith; (ii) the Government's obligation to maintain on its own facilities equipment that will protect the permittee's normal and efficient operations; and (iii) whether a permittee, if it has not given 36 months' notice, could use the surplus capacity on its line whenever it "has need to do so."

As to the appellant's general observations regarding the "understanding" evidenced by the regulations, we are constrained to observe that this Department is faced with the responsibility for the marketing of very large quantities of Federally generated power in the manner directed by Congress; the protection and wise utilization of a very substantial Federal investment in hydroelectric power generating facilities; and the preservation and conservation of the Nation's interests in its public lands. 24/

More responsively, we find the appellant's arguments on this ground premature. The regulations serve to articulate certain fundamental legal relations subsisting between the Government and the permittees who place transmission lines on Government lands. The regulations do not purport to be a substitute for the complex, contractual relations that must exist before Government attempts to make use of a permittee's transmission facilities. This is made expressly clear by the reference to "supplemental agreements" at subparagraph (xii) of the stipulation. The permittees may assume that if or when Government contracts to use any surplus capacity of a permittee's transmission lines, the Government will not interfere with and will respect all legal rights and interests of the permittees. "There can be no purpose in the Act [or the regulations issued thereunder] of dealing unfairly with the permittee and his investment." 25/

In view of the foregoing, the decision of the Land Office was proper and it is affirmed.

The Southern California Edison Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840, 1964 Special Supp., (formerly 43 CFR Part 221). See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of

---

24/ "If any of the regulations go beyond what Congress can authorize or beyond what it has authorized, those regulations are void and may be disregarded; but not so much as are thought merely to be illiberal, inequitable or not conducive to the best results." Utah Power & Light Co. v. U. S. 243 U.S. at 410.

25/ U. S. v. Colorado Power, supra, at 221.

Land Management, Washington, D. C. 20240. The filing fee is $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosure

DISTRIBUTION

Southern California Edison Company (Certified Mail)
H. Robert Barnes, Attorney at Law
Division of Lands and Minerals
Assistant Secretary, Water and Power (50)
Appeals List No. 1

appeal to Sec
dismissed A-30501
1-4-66

DOCKET FILES
DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 MAY 6 AM 10 00

Right-of-Way: Tramways 2234.2

It is proper to reject an application for a tramroad right-of-way where its allowance would be detrimental to a State's highway program which is for the benefit of the general public.

Harold Ladd Pierce, Riverside 04264 (April 12, 1965)

In reply refer to:
704
Riverside 04264

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 MAY 6 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 12, 1965

Certified Mail
Return Receipt Requested

DECISION

Harold Ladd Pierce : Tramroad Right-of-Way

Decision Affirmed

Harold Ladd Pierce has appealed from a decision of the Riverside District and Land Office, dated January 28, 1965, rejecting his application for a tramroad right-of-way, for the following reasons:

1. The maps furnished by Mr. Pierce are not adequate to identify the traverse of the requested road right-of-way.

2. The proposed tramroad right-of-way intersects a State highway at points where there is no access at present, none is planned by the State Division of Highways in the future, and the State has advised that additional access points at the places where Mr. Pierce's proposed tramroad intersects the highway would be extremely detrimental to its program.

3. No tramroad right-of-way is needed by Mr. Pierce to transport rock material from his proposed quarry sites to the existing highway.

The appellant alleges that:

1. The second map which he submitted to the Riverside District and Land Office was orally approved as adequate. Nevertheless, he is prepared to submit any additional documents necessary to comply with the requirements.

2. There is highway access at the present time at four places.

3. The adjacent unclaimed public lands could be patented to others, upon application, without reserving the necessary right-of-way for the benefit of the appellant.

4. There is no justification for regarding the desires of the State Division of Highways as tantamount to the interests of the public.

The record shows that the public lands over which the appellant has requested a right-of-way lie between a State highway and an area of other public lands in which the appellant has some unpatented mining claims. The appellant states that the requested right-of-way is needed by him for mining purposes access onto the State highway.

The Act of January 21, 1895 (28 Stat. 635; 43 U.S.C. 956) provides, in pertinent part:

> "The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, * * * for tramroads * * * by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying * * *".

Departmental regulation 43 CFR 2234.2-3(e)(4)(i) defines the nature of tramroad rights-of-way as follows:

> "Permits for rights-of-way for tramroads, do not constitute easements. * * * The permits are merely non-exclusive licenses to transport * * * products owned by the permittee. * * *"

The Secretary of the Interior is vested with the discretion of determining in each case whether it would be proper to issue a right-of-way permit. See 20 L.D. 165, 166 (1895); 23 L.D. 519, 520 (1896). It is the Secretary's responsibility to consider the broad view which would "subserve the interests of the whole people." Cf. California-Nevada Canal, Water and Power Co. 40 L.D. 380, 384 (1912).

In Cameron v. United States, 252 U.S. 450 (1920) the Supreme Court said:

> "By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stats., sec. 441, 443, 2478" (underline added).

The California State Division of Highways has asserted that the allowance of the right-of-way requested by the appellant would be extremely detrimental to its highway program. The appellant has presented no evidence to refute that assertion. We can only conclude, therefore, that it would not be in the public interest to allow the right-of-way. Accordingly, the decision of the Riverside District and Land Office rejecting the appellant's application is affirmed.

Harold Ladd Pierce is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

James F. Doyle
Chief, Office of Appeals
and Hearings

Enclosures

DISTRIBUTION
Bridges & Bridges, Attorneys at Law (Certified Mail)
Harold Ladd Pierce
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
MHS

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 MAY 6 AM 10 00

DOCKET FILES

Rights-of-Way: Generally (Appraisal Fair Market Value) 2234

Where it has been determined upon reappraisal that the rental for certain public land for a radio and microwave facility is $50 per annum, such reappraisal will not be disturbed in the absence of positive evidence by the right-of-way applicant that it is erroneous.

Atchison, Topeka and Santa Fe Railway Company, Los Angeles 0168289
(May 14, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 MAY 26 PM 2 39

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 MAY 6 AM 10 00

DOCKET FILES

Rights-of-Way: Generally (Appraisal Fair Market Value) 2234

Where it has been determined upon reappraisal that the rental for certain public land for a radio and microwave facility is $50 per annum, such reappraisal will not be disturbed in the absence of positive evidence by the right-of-way applicant that it is erroneous.

Atchison, Topeka and Santa Fe Railway Company, Los Angeles 0168289
(May 14, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 MAY 26 PM 2 39

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Los Angeles 0168289

May 14, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Atchison, Topeka, and Santa Fe Railway Company	:	Right-of-Way (Radio and Microwave Relay Station)

Decision Affirmed as Modified

The Atchison, Topeka and Santa Fe Railway Company has appealed from a decision of the Land Office at Riverside, California dated February 7, 1964. In that decision the company was required to remit the sum of $350, representing the advance annual rental for a right-of-way for radio and microwave facility on public land pursuant to its above identified application.

The appellant alleged that the rental charge of $350 per annum is arbitrary, unreasonably high, bearing no reasonable relationship to the fair market value of the land, and is contrary to accepted appraisal principles. It asserted that the annual rental based on the fair market value of the land should not be more than $15 per annum.

After carefully considering the data submitted on appeal and the reappraisal report of the Bureau's field office, it was concluded that the reappraised annual rental value of the land for communication purposes should be $50, as determined by such reappraisal, instead of $350 as stated in the decision of the Riverside Land Office. The reappraisal report listed three separate classes of communication sites within the Riverside District and the appraised annual rental value of each as follows:

"Class I	Multiple Use Metropolitan Sites (Local site value which serves population center)	$300 to $400
"Class II	Multiple Use Remote Sites With Definite Site Values (Pronounced peaks or other lands with definite site values which are generally remotely located with respect to population centers)	$200 to $300
"Class III	Single Use Sites (Transcontinental and related communication systems - No definite or pronounced site value)."	$50

The Bureau's field office determined that the land under consideration was a Class III, Single Use Communication Site, and, accordingly, established the annual rental value at $50. We conclude that the record supports this proposed rental.

Although notified by letter of February 23, 1965 that the reappraised annual rental for the use of the land by the appellant is $50, the appellant has not made any response thereto. Neither has the appellant submitted any positive evidence to support its contention that the annual rental charge should be not more than $15.

Accordingly, the decision appealed from is affirmed as modified herein.

The Atchison, Topeka and Santa Fe Railway Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C., 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

James F. Doyle

Chief, Office of Appeals and Hearings

Enclosures

DISTRIBUTION:

Jayme C. Billey, California Law Department, The Atchison, Topeka and
    Santa Fe Railway Company (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M FM (2)
OPD
Appeals List No. 1
MHS

appeal to Sec
affirmed A-30534
5-31-44

Pub
misc

DOCKET FILES

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 AUG 2 AM 10 00

Rights-of-Way: Protest 2234

It is proper for the Land Office to dismiss a protest against the allowance of a right-of-way application where the real issue involved is the determination of conflicting claims to water rights over which the Department has no jurisdiction.

Mill Sites: Valid Use 3460

The drilling of wells and installation of pumps and related equipment on a mill site for the purpose of appropriating and transporting ground water to a distant mine for mining or milling purposes is a valid use of mill sites under R.S. § 2337 (1875), 30 U.S.C. § 42 (1964).

Howard C. Brown, Riverside 04763 (July 22, 1965)

In reply refer to:
704
Riverside 04763

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

July 22, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Howard C. Brown, Protestant : Right-of-Way Application
:
:
Decision Affirmed

Mr. Howard C. Brown has appealed from a decision of the Riverside District and Land Office dated April 7, 1965. The decision dismissed Mr. Brown's protest against any renewal, extension, or approval of the right-of-way application of Kaiser Steel Corporation for water supply facilities (water pipe line and power line) within Sec. 1, T. 4 S., R. 14 E., and Secs. 3 to 10, T. 4 S., R. 15 E., S.B.M., California. Permission in advance of approval, was granted on March 25, 1964, for Kaiser Steel Corporation to commence construction of a water pipe line and power line, over the proposed right of way.

The record indicates that the subject right of way is being used to transport percolating ground water from unpatented millsites, located by Kaiser on Sections 2, 10 and 11, T. 4 S., R. 15 E., S.B.M., California, to its iron mine which is located approximately six miles distant in the western end of Chuckwalla Valley along the eastern slopes of the Eagle Mountains. The water is presently used in the operation of the iron mine and additional water will be utilized by an iron ore pelletizing plant now under construction. The first Notices of Ground Water Extraction filed by Kaiser with the State Water Rights Board show that its Chuckwalla Wells Nos. 2 and 3, located respectively on millsites in sections 2 and 11, produced a total of 432.31 acre feet of water during 1964, their first year of operation.

In his statement of reasons for appeal the appellant contends that:

(1) The water wells drilled on the millsites by Kaiser constitute improper use of a millsite location under the mining laws.

(2) No proof of ownership of the water has been provided by Kaiser as required by the regulations in 43 CFR 2234.1-2(d)(2), nor has Kaiser complied with the statutory procedures of the State of California which govern the right to appropriate water.

(3) The Department held in Oscar O.H. Nelson et al., Los Angeles 0160613, etc. (September 17, 1959) (approved by the Assistant Secretary of the Interior September 25, 1959), that there is already insufficient ground water in the basin, considering the

> ratio of current consumption to long term probable recharge. It would be against the public interest to allow further depletion of the already overdrawn water resources of Chuckwalla Valley to the irreparable damage of those desert land entrymen whose agricultural activities are entirely dependent upon the continued availability of ground water.

The appellant further contends that Kaiser's drilling of water wells is not a valid use of millsites within the meaning of R.S. § 2337 (1875), 30 U.S.C. § 42 (1964). He cites several Departmental decisions to the effect that a mill site may not be appropriated merely to secure water. In addition he cites *Ash Peak Mining Company*, 47 L.D. 580 (1920), as authority for his contention that the sinking of wells alone is not sufficient to justify allowance of entry of land as a millsite, there must also be the construction of substantial improvements for use in mining or milling. In effect, the appellant argues that drilling wells on a millsite for the purpose of appropriating water which is transported to some other place to be used for mining or milling purposes is not a valid use of the millsite.

In *Sierra Grande Mining Co.* v. *Crawford*, 11 L.D. 338 (1890), the use and occupancy of the land for the maintenance of pumping works necessary to the operation of a lode mine was held to be such use as would authorize entry of the land as a millsite. In that case the mill site was used to procure water which was piped to a distant mine. An engine and pumps were placed on the mill site as well as housing for engineers and the area was fenced off. The Department said (P.343) . . . . "It is true that the Company consumes only the water, but it occupies and uses the land in connection with its lode mine, and such use is necessary to the operating of the mine."

In the *Ash Peak Mining Company* case, *supra*, the mill site applicant expended more than $4,000 in construction of a pipe line from the mill sites to the mine, tunneled into solid rock to increase the water supply, erected a house for occupancy by its employees on one mill site, and installed a pump at the mine. The Department held that allowance of the entry as a mill site was justified because acquisition of the land was essential to the utilization of the water right claimed within its limits and the water was transported to the mine for use in mining. As stated in that decision, ". . . the water is obtained by the sinking of wells on the mill site areas, in itself a substantial and permanent improvement thereof (not to mention the other improvements of said mill sites), and it is conveyed to the mining claims for use in their operation, to which it is essential."

In the instant case Kaiser has drilled deep wells with steel pipe casings and has installed a deep well pump, surge tank, pressure station and enclosure with four pumps, switching house, and fencing. The well system also includes the water pipeline to the mine and the electric power line from the mine to the pumps. Clearly these constitute substantial and permanent improvements upon the mill sites. Kaiser has shown that it needs the water acquired from the mill sites for use in its mining operations. We must conclude that the appellant has failed to prove that the mill sites are not being used for a valid mining or milling purpose within the meaning of 30 U.S.C. § 42 (1964).

The regulations in 43 CFR 2234.1-2(d)(2) provide that if a right-of-way project involves the storage, diversion, or conveyance of water, the right-of-way applicant must file a statement of the proper State official that he has a right to the use of the water. The State of California grants no statutory right of use for percolating ground water. Therefore, it is impossible for Kaiser to comply literally with the regulations. The record shows that Kaiser has complied with the requirement of the California Water Code § 5004, by filing notices of extraction of groundwater within six months after the close of the previous calender year. Under the circumstances, this evidence that Kaiser has complied with applicable California law is sufficient to satisfy the Department's regulations.

In Oscar O.H. Nelson, et al., supra, cited by the appellant, the Department decided that all pending agricultural applications for public lands in Chuckwalla Valley would not be accepted because the existing ground water use already exceeded the annual recharge to the whole drainage basin. In that decision the Secretary of the Interior exercised his authority under Section 7 of the Taylor Grazing Act as amended, 43 U.S.C. § 315f (1958), to classify the land as not suitable for agricultural entry when he determines that there is an insufficient supply of percolating water to permit the reclamation of entries. See Ruby E. Huffman, et al., 64 I.D. 57 (1957). The Secretary does not, however, have authority to refuse to allow an entry for a millsite under the mining laws when the land involved is otherwise open to such entry.

At the heart of the appellant's protest is his apprehension that the extraction of large quantities of water will further deplete the ground water table of Chuckwalla Valley. He has no adverse claim to the mill sites involved and no apparent objection to the physical location of the proposed right-of-way. He is simply asking the Department to determine that as between himself, as user of percolating ground water for the benefit of his overlying land, and Kaiser, which is appropriating water for transportation out of the groundwater basin area for use on distant land, the appellant's rights as overlying owner should be paramount.

The Department does not have jurisdiction to determine questions involving the conflict of claims to water rights. Silver Lake Power & Irrigation Co. v. City of Los Angeles, 37 L.D. 152, 153 (1908), and the cases cited therein. Jurisdiction is essential to give validity to the determination of an administrative agency. Lacking jurisdiction, any determination made by the Department would be void and subject to collateral attack. Since the determination of water rights is not a matter within the jurisdiction of the Department, any question of public interest or irreconcilable conflict between the parties must be settled by the courts of the State of California. Cf. Robert J. Edwards and J. C. Jamieson v. Oscar T. Sawyer, 54 I.D. 144, 148 (1933).

Accordingly, the decision of the Riverside District and Land Office dismissing the appellant's protest is affirmed.

Howard C. Brown is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Kaiser Steel Corporation
Fontana Works
P. O. Box 217
Fontana, California

James F. Doyle
Chief, Office of Appeals
and Hearings

Enclosures
Dist. on page 5

DISTRIBUTION:
Mr. Ted R. Frame, Attorney for Appellant (Certified Mail)
Mr. Howard C. Brown
Kaiser Steel Corporation
Hon. John V. Tunney, House of Representatives
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
AKR

③

DOCKET FILES

Rights-of-Way: Generally (Fair Market Value Appraisal) 2234

Where the annual rental of a radio relay site and access road right-of-way was determined after a careful study of the rentals charged for a large number of similar sites; and the judgment exercised by the Bureau's appraiser appears to be reasonable and is based upon a full consideration of the facts involved; and there is nothing in the record showing that the value figures were arbitrary; the reappraisal will not be disturbed.

The Pacific Telephone and Telegraph Company, Los Angeles 0170409

(October 26, 1965)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 NOV 4 PM 2 37

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Los Angeles 0170409

October 26, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

The Pacific Telephone and Telegraph Company : Right-of-Way (Radio Relay Site and Access Road)

Decision Affirmed as Modified

The Pacific Telephone and Telegraph Company has appealed from a decision of the Riverside Land Office, dated August 13, 1963, [1] holding its application for a radio relay site and access road for rejection and requiring the payment of rental for the years 1962 and 1963, computed at the rate of $500 per annum.[2]

The appellant alleged, in its statement of reasons for appeal, that the appraised annual rental is excessive. The Company submitted an appraisal report from its own real estate appraiser, which concluded that the annual rental value of the 5.66-acre radio relay site is $65.

The Bureau's State Director for California was requested to reconsider the Bureau's fair market value appraisal of the subject radio relay site. Pursuant to that request, a reappraisal report of January 1965 concluded that the annual rental value of the site is $300 instead of $500. This reappraisal was made available to the Company and on the basis thereof the Company submitted a suplementary statement of reasons for appeal which contains the following allegations:

1. The reappraisal is subject to the same criticism as the original appraisal, namely, the methods employed violate accepted appraisal principles and techniques for measuring fair market value.

---

[1] This case is 1 of 10 that were appealed by the Company for the reason that the appraised annual rental charge in each case was alleged to be excessive. Upon reappraisal the Bureau determined that the annual rental value of 9 of the sites is $50 and the annual rental value of the site in this case is $300. The Company withdrew its appeals in the 9 cases in which the sites were reappraised at $50.

[2] This decision was preceded by a letter of May 1, 1963, to the Company, which itemized what had been remitted by the Company and what is due and payable by it, from August 8, 1961 thru December 31, 1963.

2. The conclusion that the highest and best use of the site is for communication purposes is not supported by the facts.

3. The reappraisal report classifying the site as a Class I or metropolitan site does not meet the reappraisal report's own definition of a metropolitan site that such a site should be located within 30 miles of a population center with a majority of sites located within 10 miles of the population being served. The site in question does not serve any of the surrounding communities. Only two small communities, Lucerne and Apple valleys, are located within 10 miles of the site.

4. The site is not in demand by any other user, nor is any such demand anticipated in the forseeable future.

5. The site does not belong in Class II either, since this classification requires some pronounced physical feature that is singularly lacking in this case.

6. A rental figure of between $75 and $125 per annum would be acceptable.

The reappraisal report states that the site is comparatively distant from dense population centers. However, the site is located near the fringe of the "Metropolitan area" and the factors of power, access, and serviceability are good. The population centers surrounding the site are as follows:

San Bernardino - 25 miles to the southwest
Victorville - 17 miles to the northwest
Apple Valley - 10 miles to the northwest
Barstow - 35 miles to the north
Lucerne Valley - 7 miles to the northeast.

The reappraisal report lists three separate classes of communication sites within the Riverside District and the appraised annual rental value of each as follows:

"Class I Multiple Use Metropolitan Sites $300 to $400
(Local site value which serves population center)

"Class II Multiple Use Remote Sites with Definite Site Values — $200 to $300

(Pronounced peaks or other lands with definite site values which are generally remotely located with respect to population centers)

"Class III Single Use Sites — $50

(Transcontinental and related communication systems - no definite or pronounced site values)."

The report also states:

> "There were approximately 50 private Class I leases considered for use in this appraisal, however, due to lack of complete information and other qualifying conditions only 14 private leases and 5 BLM leases were included. It should be pointed out, however, that all the leases originally considered indicated a similar value range. The rental values for BLM leases presented in this appraisal are considered as justifiable market data because they represent the values which knowing lessees are willing to pay for Class I Communication sites."

This master reappraisal report is supplemented by three additional BLM site rentals; one in January 1965 for $300 annually and two in August 1965, one for $300 and the other for $400 annually.

It is noted that the rental rate for the subject site is the minimum price set for a Class I site and it is the maximum price set for a Class II site. This rental rate appears to have been ascertained after studying approximately 50 private Class I leases and after comparing the rental ranges of 14 private sites and 5 BLM sites that are similar to the site under consideration. It is recognized that almost any appraisal involves factors of judgment on which experts in the field may disagree. It seems, however, that the judgment exercised by the Bureau's appraiser was reasonable and was made after the identification and full consideration of the pertinent facts involved. After careful consideration of all the appraisal information in the record, it has been determined that the methods used by the Bureau's appraiser were proper, and that the fair value figures reached by him are not arbitrary. Consequently, in the absence of convincing evidence that the reappraised rental charge is excessive, it will not be disturbed. El Paso Natural Gas Company, A-30528 (August 25, 1965).

Accordingly, the decision is affirmed as herein modified.

The Pacific Telephone and Telegraph Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

James F. Doyle
Chief, Office of Appeals and Hearings

Enclosures

DISTRIBUTION:

Gray, Cary, Ames, and Frye, Attorneys at Law (Certified Mail)
Pacific Telephone and Telegraph Company
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
MHS

R/W

DOCKET FILES
DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

Rights-of-way: Cancellation 2234.1-5 1967 MAY 31 AM 10 00

A right-of-way granted for a mobile radio relay station must be cancelled where the grantee has failed to comply with the applicable laws and regulations with respect to obtaining a permit to construct or license to operate the station from the Federal Communications Commission.

E. E. Stickles, Riverside 06734 (May 22, 1967)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Riverside 06734

BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 MAY 31 AM 10 00

May 22, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

E. E. Stickles	Right-of-way (Radio Relay Station and Access Road)

Decision Affirmed

E. E. Stickles has appealed from a decision of the Riverside District and Land Office, dated January 18, 1967, cancelling his above-identified right-of-way for a mobile radio relay station and access road because of his failure to furnish proof of having secured a construction permit or license from the Federal Communications Commission for the construction and operation of the radio relay station.

Record information shows that the right-of-way was granted on August 6, 1965, with the stipulation, among others, that the grantee, the appellant, would within six months submit a showing that the proposed structure or facility is licensed, authorized or otherwise cleared with the Federal Communications Commission. By letter dated July 8, 1966, the appellant was reminded of this stipulation in the right-of-way grant, and was allowed another six months time within which to furnish the required authorization from the Federal Communication Commission. Appellant was advised that if he failed to obtain the required authorization during the extended period, appropriate action would be taken to cancel the right-of-way grant. This was done in the decision below.

In his appeal, Mr. Stickles contends, in substance, that he has diligently filed his application with the Federal Communications Commission for a permit to install the subject radio relay station on the land in question; and, that although the Commission has been advised that time is of the essence, it has been slow in taking action on his application for a permit or authorization to construct and operate the radio relay station. The appellant also asserts that he has expended approximately $1,000 is constructing the access road and bringing in power to the site. The appellant concludes that it is prejudicial and grossly unfair to deny and cancel the right-of-way when he has made every effort in his power to get the cooperation and license from the Federal Communications Commission.

While we appreciate the fact that the appellant has made every effort possible to comply with the terms of his right-of-way grant, we are of the opinion that the right-of-way should not have been granted in the first place until the appellant had obtained the necessary permit or license, or at least a clearance from the Federal Communications Commission to install the proposed radio relay station.

In this respect, the Department's regulations, 43 CFR 2234.1-3 relating to the granting of rights-of-way, provide in pertinent part that:

> "(c) * * * An applicant, by accepting a right-of-way, agress and consents to comply with and be bound by the following terms and conditions, excepting those the Secretary may vaive in a particular case:
>
> > (1) To comply with State and Federal laws applicable to the project for which the right-of-way is approved, and to the lands which are included in the right-of-way, and lawful existing regulations thereunder."

The authority granted to the Federal Communications Commission to regulate and control communication systems of the type hereunder consideration is contained in 47 U.S.C. §319 (1964), which provides in pertinent part as follows:

> "(a) No license shall be issued under the authority of this chapter for the operation of any station the construction of which is begun or is continued after this chapter takes effect, unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe * * * .
>
> (c) Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all of the terms, conditions, and obligations set forth in the application and permit have been fully met, * * * the Commission shall issue a license to the lawful holder of said permit for the operation of said station. * * *"

It is obvious from the language of the above-cited statute that a license to operate a radio relay station cannot be obtained unless a permit to construct the facilities has first been granted by the Federal Communications Commission. And since there is no definite assurance that a permit would finally be approved by the Commission in every such case, it would be premature for this Bureau to grant a right-of-way for such a facility on public lands unless and until such time as the applicant had obtained the required permit from the Commission. Therefore, in the circumstances of this case, it is necessary to cancel the right-of-way grant.

Accordingly, the decision appealed from is affirmed.

This decision does not prejudice the right of the appellant to reapply for a right-of-way in the same location at such time he has obtained the required authorization to construct and/or to operate the proposed mobile radio relay station from the Federal Communications Commission.

Mr. E. E. Stickles is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:

Mr. Jack Boggust, Attorney for Appellant (Certified Mail)
Mr. E. E. Stickles
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
RBO

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1967 MAY 31 AM 10 00

In reply refer to:
704
Los Angeles 062586

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

July 27, 1967

DECISION

Pacific Telephone and Telegraph Company	:	Right-of-Way

Decision Vacated
Case Remanded

The Pacific Telephone and Telegraph Company has appealed from a decision of the Riverside District and Land Office, dated January 19, 1967, demanding additional rental for the 10-year period commencing January 1, 1964, and ending December 31, 1973, in connection with the above-identified right-of-way granted under the Act of March 4, 1911, 36 Stat. 1253, as amended, 43 U.S.C. § 961 (1964).

The right-of-way was granted on December 7, 1948, at an annual rental of $15 per annum. By letter from the Riverside Land Office dated February 5, 1963, the appellant company was informed that in accordance with the regulations contained in 43 CFR 244.21(a) and 244.21(e), Circular 2069 (now contained in 43 CFR 2234.1-6(a) and (e)), the rental for the right-of-way would be $250 for the 10-year period commencing on January 1, 1964, and ending December 31, 1973, and that a lump sum payment in that amount would be due and payable on or before January 1, 1964. This amount was paid in full by the company on December 16, 1963, apparently without any objection on the part of the company, and the payment was accepted by the Riverside Land Office as payment of the full amount of the rental for the period specified, based on the reappraised value of the right-of-way as provided for by the applicable regulations referred to above.

The decision from which this appeal is taken recites that in 12 Comptroller General 383 (1932), the Comptroller General has held that there is no authority to discount obligations due the United States and, therefore, the fair market value of the right-of-way, which was reappraised at $34 per annum beginning on January 1, 1964, is a total of $340 for the 10-year period commencing on that date. The decision below allowed the appellant the option of applying the amount of $136 of the total amount paid for the four-year period ending December 31, 1967, at the rate of $34 per annum, the remainder to be refunded; or, if the appellant elected to pay on the basis of the 10-year period indicated above, the appellant would owe the Bureau an additional amount of $90 for the 10-year period, this being the difference in the amount paid by the appellant, and the amount that the Riverside District and Land Office claims to be the reappraised fair market value of the rental due for that period.

The appellant contends in substance that the original rental of $250 established for the 10-year period was in accordance with the applicable law and regulations, and that the Comptroller General's opinion referred to does not support the decision appealed from, but instead supports its own position. The appellant also asserts, among other things, that its right-of-way permit is of limited duration, 50 years from 1948, when it was first granted, or 35 years from January 1, 1964, the effective date of the reappraisal of the rental; therefore, it was necessary for the appraiser to determine the lump-sum market value of its limited right by applying the present-worth table (with a selective interest rate) to the right-of-way in perpetuity. The appellant states that because the applicable regulations permit periodic payment of rentals, it was appropriate also to determine the value of the right-of-way for a one year period, a five year period, or a ten year period merely by applying the tables, and that it was entirely appropriate for the value of the right-of-way to be appraised at $250 for a 10-year period independently from, (but derived from the use of the same formulae as), the value established for a 1-year period.

The appellant argues that the Comptroller General's decision does not detract from its conclusion but supports it, in that in the case cited the obligor had a present, binding obligation, arising out of past transactions, payable in installments, whereas in the instant case the appellant's obligation is to pay for the use of property as it uses it, and this is only a question of value of use. The appellant also asserts that an appraiser's use of so-called present-worth tables and formulae to derive the value of a right for a limited period always involves a "discount" in the sense that a selected interest rate is involved, and is merely an accepted method of determination of value. The appellant, quoting from the Comptroller General's decision, supra, points out that it held that the obligor would be permitted to prepay the remaining amount of the principal due, thus reducing future interest payments under its obligation, which, in effect, amounted to a "discount". The appellant concludes that the question is not of "discounting" current obligations, but is strictly an appraisal question, and that the method used in determining the fair market value was by applying tables and formulae to each limited period selected, and not by converting the value to that for a 1-year period and then multiplying the result by the number of years in a longer period of time. The appellant avers that to the extent this involves "discounting," such discounting is inherent in the system of appraisals, and is permitted, not proscribed, by the regulations and the Comptroller General's opinion.

After carefully reviewing the record in this case, we can only conclude that the ruling made by the Comptroller General in his decision reported in 12 Comptroller General 383, supra, is not applicable in determining whether or not the Bureau may properly allow for a reduction in the estimated fair market value upon the lump-sum payment of the rental for a certain period of years in connection with right-of-way grants. It is true that by statute the

Rights-of-way: Generally--Payment of Rental 2234

It is improper to demand additional rental for a right-of-way, where a lump-sum has previously been established by the Bureau as being the proper amount of rental to be charged for a certain 10-year period of the grant, based on the fair market value thereof, and this amount has been paid in full by the grantee upon demand.

Pacific Telephone and Telegraph Company, Los Angeles 062586 (July 27, 1967)

Rights-of-Way: Under Mineral Leasing Act 2234.5-1

While the amendatory Act of August 12, 1953 (30 U.S.C. 185) provides that the common carrier provisions of Section 28 of the Act of February 25, 1920, shall not apply to any natural gas pipe line operated by a public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality, nevertheless, it is mandatory that the common carrier stipulation be filed by the applicant before such a right of way permit may be issued to it.

Southern California Gas Company, Sacramento 637 (January 4, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 JAN 15 AM 10 00

In reply refer to:
704
Sacramento 637

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

January 4, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Southern California Gas Company	:	Natural Gas Pipe Line Right of Way

Decision Affirmed

By decision of August 4, 1967, the Sacramento Land Office required the above-named right of way applicant to execute and submit a common carrier stipulation pursuant to the terms of 43 CFR 2234.5-1(b) as a condition precedent to the allowance of the requested right of way. The applicant has appealed from this decision on the ground that it is within the exception contained in the Act of August 12, 1953 (30 U.S.C. 185).

The amendatory Act of August 12, 1953, supra, and the regulation, 43 CFR 2234.5-1(a)(2), provide that the common carrier provisions of Section 28 of the Act of February 25, 1920, shall not apply to any natural gas pipe line operated by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality. The applicant herein is a public utility subject to such regulation by the California Public Utilities Commission, and comes within the exception contained in the 1953 Act and the cited regulation.

The Department has ruled that the proviso added to Section 28 of the 1920 Act, supra, by the Act of August 12, 1953, does not relieve the Secretary of the Interior from the obligation imposed by that section of placing in all grants of such pipe line rights of way the express condition that they be constructed, operated and maintained as common carriers, M-36517 (July 23, 1958). This ruling has been reiterated in the cases of Natural Gas Pipeline Company of America, New Mexico 050294 (Oklahoma) (July 20, 1959); and Western Slope Gas Company, Colorado 029008, etc. (March 14, 1960) (Approved April 6, 1960, by Assistant Secretary of the Interior).

It was further held in Continental Oil Company, A-27973 (July 7, 1961) that Section 28 of the Mineral Leasing Act, as amended, is the only statutory authority for granting rights of way for pipe line purposes for the transportation of oil or natural gas and such rights of way may be granted only upon the conditions set forth therein (emphasis added). Section 28, as amended, reads in pertinent part:

> Rights-of-way through the public lands * * * may be granted for pipe-line purposes for the transportation of oil or natural gas * * * upon the express condition that such pipe lines shall be constructed, operated, and maintained as common

> carriers * * * Provided further, That no right-of-way shall hereafter be granted * * * except under and subject to the provisions, limitations, and conditions of this section.

The stipulation submitted by the land office for execution by the appellant contains the following proviso:

> It being distinctly understood, however, that this common carrier provision shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality.

By the inclusion of this paragraph the government has fully recognized and acknowledged the non-applicability of the common carrier provision to those operators in the excepted categories. No detriment can accrue to an exempt operator who executes such a stipulation if he remains in the excepted category until such time as he may be called upon by the Secretary to perform as a common carrier, at which time he may point to his exempt status.

Accordingly, the granting of the right of way to the appellant must be predicated on its acceptance of this condition precedent by the execution and submission of the common carrier stipulation. While the appellant may now clearly fall within the stated exception in the 1953 Act, nevertheless, it is bound by the express and explicit terms of that Act. Should it at any future time change its operations to remove itself from the stated exception, then the appellant would become subject to the other applicable terms of the 1953 Act, and the regulations thereunder.

In view thereof, the Sacramento Land Office decision was correct in requiring the execution and submission of the common carrier stipulation, and the decision is affirmed.

The Southern California Gas Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing

Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures
Dist. on page 3

DISTRIBUTION:
William H. Owens, Attorney at Law (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
LSH

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 MAY 3 AM 10 00

Rights-of-Way: Electric Transmission Line--Termination--License under Federal Power Act. 2234.4

Where subsequent to the granting of a permit for a right-of-way for an electric transmission line under the Act of February 15, 1901, the right-of-way occupied by the transmission line is reserved in patents issued for the lands, subject to the provisions of the Federal Power Act of June 10, 1920, and the conditions and limitations of Section 24 of said Act, as amended, the permit will not be renewed upon its termination, but any continued use of the right-of-way must be by license issued by the Federal Power Commission.

San Diego Gas and Electric Company, Los Angeles 032480 (April 16, 1968)

In reply refer to:
704
Los Angeles 032480

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

April 16, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

San Diego Gas and Electric Company : Right-of-Way
: (Electric Transmission Line)
:

Decision Affirmed as Modified

The San Diego Gas and Electric Company has appealed from a decision of the then Manager of the Riverside Land Office, dated March 27, 1963, holding for cancellation its above-identified right-of-way for the failure to show that the right-of-way was renewed after its expiration on April 20, 1955, or that a renewal application had been filed prior to the expiration date of the right-of-way permit.

The appellant contends, in substance, that (1) it has examined its files and found that no letter has been transmitted, it being apparent that this matter was overlooked, and (2) as it continued to pay the annual rental for the right-of-way each year when due upon the request of the Bureau, and, as it has recently agreed to a reduction in the width of the right-of-way from 100 feet to 30 feet in response to a communication from the District Manager, it is evident that the oversight was accidential.

The permit for the right-of-way was granted under the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. 959, and finally approved on April 19, 1920, by the Secretary of the Interior. Section 25 of the permit provides that the term of the final permit will extend to April 20, 1955, unless further extended by written consent of the Secretary.

The records disclose that at the time the permit was granted the lands involved were all public lands of the United States. These lands are described as NE¼NE¼ sec. 1, T. 17 S., R. 1 E., SE¼SW¼ sec. 5, NW¼NE¼ sec. 8, and W½NE¼ sec. 9, T. 17 S., R. 2 E., SBM, California. These lands were withdrawn and reserved for Power Site Reserve No. 738, by a withdrawal order dated May 14, 1920, from settlement, location, sale or entry, for purposes of electrical transmission lines, particularly as to the area described as "all portions thereof lying within 50 feet of the center line of the right-of-way shown on a detailed map designated "Exhibit J" and entitled "San Diego Cons. Gas & Electric Co., H.M. Byllesby & Co., Engineers, Barrett Dam Elec. Ext. Sect. Thru U. S. Pub. Lands, and filed in the local land office at Los Angeles, California, October 22, 1919." This withdrawal was made pursuant to the Act of June 25, 1910, 36 Stat. 847, and was specifically made to reserve approximately eight acres of the subject lands for the right-of-way for the electrical transmission lines of the appellant company.

Subsequent to the granting of the right-of-way permit, all of the lands described above have been patented under various public land laws. All of the patents issued for the subject lands, with the exception of the patent embracing the NE$\frac{1}{4}$NE$\frac{1}{4}$ (Lot 1) sec. 1, T. 17 S., R. 1 E., contain a clause reserving to the United States, its permittee, or licensee, the right to enter upon, occupy and use, any part or all of that portion of the lands involved lying within fifty feet of the center of the transmission line right-of-way of the San Diego Consolidated Gas and Electric Company for the purposes provided in the Act of June 10, 1920, 41 Stat. 1063, subject to the conditions and limitations of Section 24 of said Act, and in one case, as amended by the Act of August 26, 1935, 49 Stat. 846. 1/

Thus, regardless of the fact that title to the lands is no longer in the United States, the titles were conveyed subject to the right-of-way. This also includes the NE$\frac{1}{4}$NE$\frac{1}{4}$ (Lot 1) sec. 1, T. 17 S., R. 1 E., even though no reservation was contained in the patent issued for this land. The courts have held that a permit for a right-of-way issued by the Secretary [pursuant to the Act of February 15, 1901], is not revoked by the subsequent issuance of government patents, but continues in effect until revoked. That there is no express reservation for the right-of-way in the patent does not defeat the permittee's right. Swendig v. Washington Water Power Company, 265 U.S. 322 (1924). Nevertheless, although the issuance of the patent to said Lot 1 without the specific reservation of a continuing easement did not revoke the permit, it appears that the right-of-way was extinguished when the appellants' permit expired by its own terms in 1955.

However, the holding in the land office decision that the right-of-way reserved to the United States in the other patents was terminated and taken over by the intervening rights of the patentees upon the expiration of the appellant's permit is in error. The United State's reserved interests in the lands are not affected by the expiration of a permit issued by it. The occupancy of the lands by the appellant since the expiration of the permit has been without legal authority.

With reference to the jurisdiction of the Bureau of Land Management to act on appellant's application for renewal, Departmental regulation 43 CFR 2022.1 provides that:

> The following classes of lands are considered as withdrawn or classified for power purposes for the purposes of section 24 of the Federal

---

1/ Even though the appellant may have indicated that the right-of-way could be reduced to 30 feet in width, the reservation of the right-of-way in the patents issued for the lands in question definitely establishes the width of the right-of-way at 100 feet.

> Power Act: Lands *withdrawn for powersite reserves under the act of June 25, 1910 (36 Stat. 847)* as amended by the act of August 24 1912 (37 Stat. 497; 43 U.S.C. 141-143); lands included in an application for power development under the Federal Power Act; lands classified for powersite purposes under the act of March 3, 1879 (20 Stat. 394; 43 U.S.C. 31); *lands designated as valuable for power purposes under the* acts of June 20, 1910 (36 Stat. 557, 564, 575), June 9, 1916 (39 Stat. 218, 219), and February 26, 1919 (40 Stat. 1178, 1180); lands within final hydroelectric power permits under the act of February 15, 1901 (31 Stat. 790; 43 U.S.C. 959); *and lands within transmission-line permits or approved right-of-way under said act of 1901* or the act of March 4, 1911 (36 Stat. 1253; 16 U.S.C. 5, 420, 523; 43 U.S.C. 961). (Emphasis Added).

In view of the fact that the right-of-way in question is being used for power purposes, and has been reserved in the subject lands pursuant to the Federal Power Act of June 10, 1920, as amended, it is our opinion that the right-of-way permit granted to the appellant cannot be renewed under the Act of February 15, 1901, *supra*. It has been held by the Department in similar cases that the Act of 1901 has been superseded by the Federal Power Act of June 10, 1920, as amended, and whenever a grant of a right-of-way under the 1901 act shall have expired, continued use of the right-of-way [as to power projects for the generation and transmission of hydroelectric power over primery lines] can be authorized only under a license issued by the Federal Power Commission. See *Keating Gold Mining Company, Montana Power Company, Transferee*, 52 L.D. 671 (1929); *Arizona Power Company*, 52 L.D. 705 (1929). See also 32 Ops. Atty. Gen. 525 (1921), and 43 CFR 2234.4-1(a)(3).

Accordingly, if the appellant company desires to continue the use of the right-of-way in question, appropriate application should be made to the Federal Power Commission for a license under the Federal Power Act.

The decision appealed from is modified to this extent, and affirmed as modified.

San Diego Gas and Electric Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
San Diego Gas and Electric Company (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
RBO

Rights-of-Way: Generally 2234

Where a departmental regulation provides that the rates charged for a right-of-way may be revised only after notice and an opportunity for hearing, it is improper to increase the rates without following the prescribed procedure.

Words and Phrases

The terms "value", "actual value", "market value", and "fair market value", in common parlance, are used interchangeably.

James W. Smith etc., Los Angeles 0163131 (May 16, 1968)

In reply refer to:
704
Los Angeles 0163131

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

May 16, 1968

DECISION

James W. Smith, d.b.a. : Right-of-Way
Mountain Relay Company : (Radio Relay and Communication Site)
:

Decision Reversed in Part

James W. Smith has appealed from that part of a decision of the Riverside District and Land Office, dated January 24, 1968, notifying him that his radio relay and communication site has been reappraised and the annual rental increased to $400 beginning January 1, 1969.

The appellant's allegations may be summarized as follows:

1. When his right-of-way was allowed in 1959, departmental regulation 43 CFR 244.21(b) provided that the charge for the site shall be based upon "the value of the land". Therefore, he should not be required to pay the "fair market value of the permit, right-of-way or easement", as required by the 1964 regulation.

2. The current departmental regulation, providing that reappraisal be based upon fair market value, is being applied retroactively and, therefore, he is being unconstitutionally deprived of a vested right.

3. The value of the land has not increased in value eight times since 1959.

4. Administrative rule making cannot be applied retroactively when it is unreasonable, unfair, or creates undue hardship for the individual to whom it is applied.

The record shows that the appraised rental value of the site in 1959 was $55 per year. The rental value of the site was reappraised at $300 per year in 1962, but this new rental was not put into effect because of the departmental regulation which provides for reappraisals at not less than 5 year intervals of time after the allowance of the permit.

The terms "value", "actual value", "market value", and "fair market value" are used interchangeably. The term "value" cannot be given a limited meaning, as distinguished from its usual legal definition, unless an intention to so use it appears. See cases collected in 44 Words and Phrases 56-83, defining "value". There is nothing in the regulation requiring a limited meaning for the term "value". Nor has the appellant shown that a

limited meaning of the term "value" was intended. Consequently, there is no merit to the contention that a different standard is being applied retroactively.

However, departmental regulation 43 CFR 2234.1-6(e) provides, as a condition precedent to the imposition of new charges, that the permittee shall be given "reasonable notice and opportunity for hearing." The Department has ruled that it is improper to increase the rates without following the prescribed procedure. Texas Gas Transmission Corporation, A-29856 (January 14, 1964). The appellant has not been afforded this opportunity.

Accordingly, the decision of the District and Land Office, insofar as it relates to the imposition of the increased rate, is reversed and the case is remanded for further action consistent herewith.

Newton Frishberg
Chief, Office of Appeals
and Hearings

DISTRIBUTION:
Hervey & Mitchell, Attorneys at Law
James W. Smith
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
MHS

Rights of Way: For Railroads 2234.2

The Bureau of Land Management may not cancel any portion of a railroad line right of way unless the Interstate Commerce Commission first issues a certificate that the present or future public convenience and necessity permit the abandonment therof. The authority of the Commission does not extend to the abandonment of switching or side tracks located wholly within one State, and relinquishments of such switching or side tracks can be accepted by the Bureau without the necessity of a certificate from the Interstate Commerce Commission.

Southern Pacific Company, Sacramento 023610, etc. (June 21, 1968)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 JUL 19 PM 3 09

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

704
Sacramento 023610
023720
024228
024229

June 21, 1968

DECISION

Southern Pacific Company : Railroad Rights of Way

Decision Reversed
Cases Remanded

Pursuant to the Act of March 3, 1875 (18 Stat. 482, 43 U.S.C. 934-939), rights of way were granted to the Central Pacific Railway Company, predecessor to the Southern Pacific Company, over lands in the Modoc National Forest, California, for:

023610 - Station Grounds, Hackamore, approved April 13, 1929;
023720 - Station Grounds, Ambrose, approved April 13, 1929;
024228 - Wye Tracks, Ambrose, approved July 12, 1929; and,
024229 - Wye Tracks, Hackamore, approved July 1, 1929.

By letter of August 3, 1965, the Regional Forester, U. S. Forest Service, reported that these grants were no longer being used by the railroad company and that all the improvements have been removed from the area included in the grants, and recommended termination of the grants. On August 9, 1965, the Sacramento Land Office notified the Southern Pacific Company thereof and advised it that if these rights of way were no longer being used it might wish to file relinquishments of them, under 43 CFR 2234.1-4(b)(2). The Company filed no relinquishments in response to this notice.

By decision of April 22, 1968, the Sacramento Land Office required the Company to show cause why the right of way grants should not be canceled for nonuse. The Company has timely filed an appeal from this decision.

In its appeal, the Company states that it did not file relinquishments as suggested in the August 9, 1965, letter, because it desired to hold the rights of way for railroad purposes; that upon a current review after receipt of the April 22, 1968, decision, the Company has determined that it desires to hold the station grounds at Hackamore and Ambrose for present and future railroad use, but is willing to file relinquishments of the wye track rights of way at both places, if the Bureau can show that the United States owns the underlying fee title to the land occupied by the wye tracks. The appellant also argues that the decision of April 22, as it relates to the station grounds, is not valid because the Land Offics has no authority to issue such an order or to terminate the right of way grants until the Interstate Commerce Commission issues a certificate of public convenience and necessity permitting abandonment of these rights of way. The appellant further states that the station grounds at Hackamore and Ambrose are integral portions of its railroad lines between Klamath Falls, Oregon, and Fernley, Nevada, which it intends to hold for its railroad requirements.

We agree that the land office is without authority to cancel the right of way underlying the station grounds in the absence of authorization by the Interstate Commerce Commission. The power to cancel rights of way contained in 43 CFR 2234.1-4(b)(2) is expressly limited:

> Unless otherwise provided by law, rights-of-way are subject to cancellation * * * for abandonment or nonuse.

The Act of February 4, 1887, as amended (49 U.S.C. 1 (18) et seq.), states in pertinent part:

> (18) No carrier by railroad * * * shall * * * abandon * * * any portion of a line of railroad * * * unless and until there shall first have been obtained from the /Interstate Commerce/ Commission a certificate that the present or future public convenience and necessity permit of such abandonment.
>
> (20) * * * From and after the issuance of such certificate, and not before, the carrier * * * may * * * proceed with the * * * abandonment * * *. Any * * * abandonment contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court * * * at the suit of the United States.

Since the Interstate Commerce Commission has not issued a certificate of convenience and necessity authorizing abandonment of the station grounds rights of way, the Sacramento Land Office has no authority to attempt to cancel them. 1/

Moreover, it is questionable whether the Company has abandoned these rights of way. It has been held that the word "abandon" in 49 U.S.C. 1 (18), _supra_, means to give up permanently, not merely to suspend operations. _Myers_ v. _Arkansas & Ozarks Ry. Corp._, 185 F. Supp. 36 (D.C. Ark. 1960). The appellant states that it has not abandoned the right of way and intends to hold it for railroad purposes. The record does not refute the Company's intent not to abandon these rights of way. 2/

1/Accordingly, it is not necessary to rule on the issue of the Bureau's jurisdiction to cancel these rights of way, assuming proper authorization were obtained from ICC. We should point out, however, that there is authority for the proposition that such cancellation might be had only through court proceedings. See _United States_ v. _Denver & Rio Grande Western Railroad Company_, 2 F. 2d 873 (D.C. Utah 1924).

2/Conversely, there has been no showing by the appellant of its authority for the cessation of use and its removal of all improvements from the Ambrose and Hackamore station grounds.

Turning to the cancellation of the rights of way underlying the wye tracks, paragraph (22) of 49 U.S.C. 1 reads in pertinent part:

> The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the * * * abandonment of * * * switching, or side tracks, located * * * wholly within one state.

The appellant has stated that it is willing to relinquish the wye tracks at Hackamore and Ambrose if the Bureau can show that the United States owns the underlying fee title to the lands occupied thereby. The wye tracks were constructed on land the fee title to which has always been in the Federal Government, the land being within the Modoc National Forest. The records show that no transfer of this fee title has ever been made.

Furthermore, the courts have held that the grant of a right of way under the 1875 Act, *supra*, is an easement and not a transfer of a fee title, the right being one of use and occupancy only, and only the easement for railroad purposes passes to the successor railroad, the fee or servient estate remaining in the United States. *Great Northern Railway Company* v. *United States*, 315 U.S. 262 (1942); *Himonas* v. *Denver and Rio Grande Western Railroad Company*, 179 F. 2d 171 (10th Cir. 1949); *United States* v. *Union Pacific Railroad Company*, 230 F. 2d 690 (10th Cir. 1956); *Continental Oil Company* v. *Chicago and Northwestern Railway Company* 148 F. Supp. 411 (D.C. Wyo. 1957).

The fee title to the land underlying the wye tracks is therefore in the United States. Since the wye tracks at Hackamore and Ambrose are "wholly within one State," the relinquishments thereof can be accepted by the Bureau without the need of first obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission.

The decision of the Sacramento Land Office of April 22, 1968, is reversed, and the case records are remanded to that office for action consistent herewith.

Newton Frishberg

Chief, Office of Appeals
and Hearings

DISTRIBUTION
Southern Pacific Company
SD (California)
LO (Sacramento)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1

appeal to Sec.-
A-31215

R/W

Right-of-Way: Under the Act of February 15, 1901 2234.4-1

An application for a right-of-way under the Act of February 15, 1901, is properly rejected where the granting of the right-of-way would adversely affect the interest of the government.

Heirs of Fred W. Sprung, Sacramento 1680 (September 4, 1969)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 SEP 19 AM 10 00

In Reply Refer to:
141
S-1680

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

September 4, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

William A. Lester :
Executor, Estate of Fred W. Sprung :

Right-of-Way

Decision Affirmed

William A. Lester has appealed on behalf of the heirs of Fred W. Sprung, from a decision of the Sacramento Land Office, dated April 4, 1969, which rejected Mr. Sprung's application for a right-of-way under the Act of February 15, 1901 (31 Stat. 790; 43 U.S.C. 959) as amended, for a pipeline for irrigation or stock watering purposes across public land in Lot 3, Sec. 14, T. 7 N., R. 12 E., M.D.M., California. The Land Office determined that it would not be in the public interest to grant this right-of-way because of the high resource values and the public interest shown in the land under consideration.

Appellant disagrees with the Land Office that it is against the public interest to grant this right-of-way. Appellant claims that the field investigation reports upon which the Land Office based its conclusion do not show sufficient value or sound reasoning to cause the rejection of the application. Appellant further claims that the Land Office did not give any consideration to the applicant's development of the source springs on the unpatented Gulch Mining Claim, nor to the fact that he had already installed this pipeline over a short distance of government land as far back as 1959.

Mr. Sprung filed his application for a right-of-way under the Act of February 15, 1901, *supra*, which provides in part that "the Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands . . . for canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying . . ." Under the general regulations promulgated by the Secretary an application for a pipe line right-of-way will not be allowed where the granting of a right-of-way would adversely affect the interest of the Government. 43 CFR 2234.4-1.

Therefore, when an application is filed for a right-of-way under this section the primary criteria for consideration is protection of the public interest.

The Land Office determination not to allow this right-of-way was based on field investigation of this area which indicates that the water supply on this segement of the public lands is critical to the value and ultimate utility of the land. If the water was removed from this land and a need later developed for the use of such water it would be difficult or impractical to replace it with other means. Additionally, as indicated in the Land Office decision, various other agencies have attributed high resource values to this land. During public coordination of the Multiple Use Classification of this tract the California Department of Fish and Game indicated this to be an area of heavy recreation use, key winter deer range, and a hunting area for deer and upland game. The Fish and Wildlife Service and the U.S. Forest Service also designated this area as a winter range requirement for resident and migratory deer. Whatever use is made of the tract, it is clear that the removal of water will not enhance its value and would adversely affect the Government's interest. Under such circumstances the Land Office's refusal to approve this application is prudent and in consonance with the requirements of the applicable regulations.

Appellant's appeal consists of a general denial of the basis for the decision below. He has not presented any positive or substantial evidence that the refusal to approve the right-of-way application is in error. No reason is given to explain why appellant cannot produce water on his own property beyond an assertion that to drill a well would be difficult and expensive. As for appellant's allegation that the Land Office did not give any consideration to the fact that Mr. Sprung has already developed springs and erected pipeline across a short stretch of government land, such facts do not warrant any special consideration. However, if the pipe line is already constructed on public land such unauthorized occupancy before the approval of a right-of-way constitutes a trespass and must be dealt with appropriately by the Land Office when this decision becomes final.

Accordingly, the decision appealed from is affirmed.

Mr. William A. Lester has a right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management,

Washington, D.C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION

William A. Lester (Certified Mail)
H. S. Gillmore (agent for appellant)
300 (6)
200
Appeals List No. 1

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1969 SEP 19 AM 10 00